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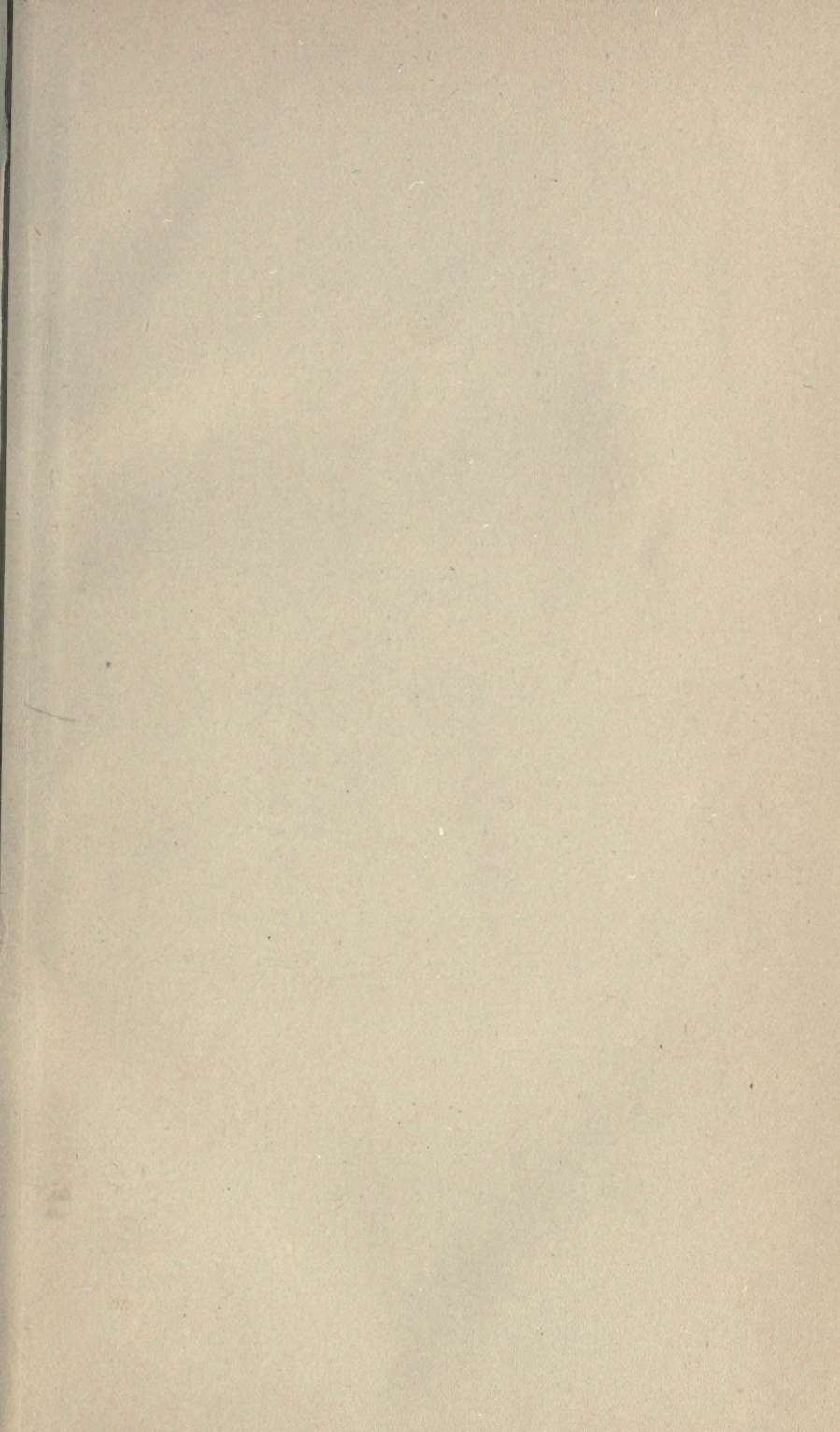


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(HAYES & JARMAN'S)

Concise
FORMS OF WILLS,

WITH

PRACTICAL NOTES.

SEVENTH EDITION,

BY

J. W. DUNNING, M.A.,

OF LINCOLN'S INN, BARRISTER AT LAW; LATE FELLOW OF TRINITY COLLEGE, CAMBRIDGE.

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PREFACE

TO THE SEVENTH EDITION.



THE Fifth and Sixth Editions of this Work were prepared by the late Mr. T. S. BADGER EASTWOOD ; and, by reason of the death of that learned Editor, it has devolved upon the present writer to prepare a Seventh Edition.

The Precedents have been revised with the tenderness due to Forms that have stood the test of constant user for more than thirty years, but at the same time with a desire to satisfy the growing demand for brevity. It is hoped that some of the Forms will supply what has been often asked for, Concise Wills adapted to the every-day requirements of testators whose small estates or moderate wishes demand simplicity in their testamentary schemes.

For the Notes, in their present shape, the undersigned is alone responsible. As regards Legislation, they include the Session of 1868; as regards Adjudication, the decisions of the Courts down to Easter, 1869.

J. W. DUNNING.

24, OLD BUILDINGS, LINCOLN'S INN,

April, 1869.

PREFACE

TO THE FIFTH EDITION.



THE Editor, by whom, under the guidance of the two learned Authors, the Fourth Edition of this Work was carried through the Press, has been entrusted with the sole responsibility of preparing it for this the Fifth Edition.

The Notes have been carefully revised and much expanded, and the Authorities brought down to the time of publication. Many new Notes have been added. The additional matter of the Notes is enclosed within square brackets.

The Forms have also been revised throughout; but as the insertion of brackets to distinguish the new matter was found to confuse the Text, they were discarded.

For all the Miscellaneous Forms the present Editor is responsible. Those Forms have, however, for the most part been taken from Wills which have been drawn in actual practice.

The Editor has to offer his warm acknowledgments and thanks to his friend and pupil JOSEPH WILLIAM DUNNING, Esq., M.A., of Lincoln's Inn, Fellow and late

Assistant Tutor of Trinity College, Cambridge, not only for his most hearty and valuable co-operation and assistance in the preparation of this Edition, and in the revision of the sheets, but also for much improved Indexes; without that assistance, the publication would have been greatly delayed.

The value of the Edition is most materially enhanced by the kindness of Mr. HAYES, who, continuing to take great interest in the Work, has made many valuable suggestions in its progress through the Press, and has also revised all the sheets.

The first sheet was in the hands of the late Mr. JARMAN for his revision at the time of his lamented death, an event which deprived the Profession of one of its most learned and amiable members, and the Editor of a kind and good friend.

LINCOLN'S INN,

October 1st, 1860.

PREFATORY REMARKS.

THOUGH many works on Wills, with the accompaniment of Precedents, are already in the hands of the practitioner, yet a portable volume of short forms, not copied from draughts, but originated with a view to general applicability, and illustrated by succinct statements of the law upon points of frequent occurrence, seemed to be still wanting. This desideratum the authors have endeavoured to supply—with what success the Profession must judge.

A notion has unfortunately obtained, that, while to the preparation of a deed learning and experience are essential, the disposition of a man's property by will may be safely confided to the minimum of legal knowledge. Hence, the conveyancer is rarely consulted, the solicitor is often dispensed with, and the schoolmaster too frequently called in; or, if the schoolmaster be not at hand, there is commonly to be found in every village a will-maker of equal courage and ignorance, the collector or inheritor of exploded forms and phrases. This notion proceeds upon the two-fold error, that wills are expounded, not according to the rules of law, but according to the dictates of common sense—and that common sense is the same in all

men. The rules of law, when applied (as applied they must be) to wills thus unadvisedly prepared, often defeat the intention, that is, the *probable* intention; but if those rules were discarded for a season, common sense, outraged by the conflict of opinion, making one poor word, perhaps, the sport of many contrariant decisions, would soon demand their restoration. The general impression, however, that wills are not amenable to the strict rules of legal construction extended its influence to the judicature, and induced a certain laxity of interpretation, which confirmed and encouraged the original error. Thus confident ignorance on the one hand, and judicial indulgence on the other, produced and reproduced blunders and obscurities of every shape and shade, which have swelled the mass of adjudication, without advancing the law as a science. But we may observe in some of the later judgments a tendency to establish a wholesome strictness of construction, to discountenance arguments drawn from vague and speculative views of the intention, and to recur to Lord Coke's "good rule, always to judge in such cases (*i. e.* cases of informal wills,) as near as may be, and according to the rules of law" (*a*). By steadily acting upon this sage advice, by showing that the principles of interpretation applicable to deeds and wills, which (with two or three well-established exceptions) are the same in their institution, are likewise the same in their application, the Profession and the Public would soon be taught that the last important office of providing for the

(*a*) 2 Bulst. 230.

disposal of men's possessions, when death has precluded the possibility of explanation or correction, requires at least the same degree of information and intelligence which is confessedly necessary to the conveyance of a rood of land from a seller to a purchaser. Such an inflexible course of decision would tend to abate, even in professional men, somewhat of that confidence which now prompts them to draw wills without any previous study, relying upon *intention* as the law of the instrument, and the liberal rectifier of all blunders.

There cannot, indeed, be a greater mistake than that of supposing that a very small stock of legal terms, added to a very ordinary education, suffices to accomplish the will-maker. On the contrary, a will is alone capable of exhausting the science and ingenuity of the most able conveyancer. It may embrace every allowable modification of property, every possible scheme of disposition. As it is the duty of the will-maker (at least of the solicitor undertaking that office) not merely to draw, but to advise, he should be conversant as well with the various modes, as with the various forms of gift; prepared alike to suggest the aptest kind of destination, and to effect it by the aptest words. Even of those testators whose wills are prepared under professional advice, it may be safely affirmed, that, while the intentions of not a few are frustrated by failure in point of expression, the intentions of a far greater number are never elicited by presenting to their consideration the arrangements most suitable to their views and circumstances. In a large proportion of cases the nature, as

well as the language of the disposition, is determined, not by the deliberate choice of the person who makes the gift, exercised over the various modes in which the law allows him to direct the enjoyment of his property after his decease, but by the extent of the knowledge possessed by the person who prepares the instrument, which may therefore be said to exhibit the *mind* of the framer rather than the *will* of the testator.

On the other hand, it must be admitted, that the blame of miscarriage is not unfrequently attributable to the testator himself. Want of explicitness or candour in the communication of the actual state of his property or circumstances, or an obstinate attachment to some favourite project, may render abortive the most judicious advice. A short-sighted economy too, which calculates the present fee and disregards the ravages of a posthumous Chancery suit, frequently obliges the practitioner to rely upon his own powers when he would willingly avail himself of experienced counsel.

So far as the mischief springs from the loose exposition of testamentary instruments, we have everything to hope from greater firmness in the judicature. So far as unskilful penning is its source, we must look to the increase of knowledge and tact in the practitioner. These it is the object of the following sheets to promote, by furnishing him with some useful suggestions, and guarding him against some not unfrequent errors. With respect to the testator himself, indeed, the evil has its root in human

nature; yet, even here, some good may be expected to result from setting before him a few simple and rational forms of disposition, with the consequences of indulgence in complicated schemes and capricious humours.

As an eminent conveyancer has often been heard to declare, that of all the duties which devolved upon his department of the Profession, that of drawing or settling a will is the most thankless and unprofitable, while it is well known that one-half, at least, of the cases laid before counsel arise out of informal wills, the preceding remarks must stand above the suspicion of seeking to attract this responsible branch of practice to the chambers of the regular draughtsman. The authors trust, indeed, that their joint labours bear internal evidence of an anxiety to assist in delivering wills from the necessity of frequent resort to counsel or to courts, by putting plain directions into the hands of the general practitioner. They are not, however, vain enough to think that no error has been admitted into the following sheets capable of producing the evils which they deprecate.

January 7, 1835.

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ABBREVIATIONS

*Used in this Volume in the References to the Reports
of Cases.*



A. & E.	Adolphus & Ellis's King's Bench Reports (1834—40).
Add.	Addams's Ecclesiastical Reports (1822—26).
Amb.	Ambler's Chancery & Exchequer Reports (1737—83).
And.	Anderson's Common Pleas Reports (1534—1605).
Anstr.	Anstruther's Exchequer Reports (1792—97).
Atk.	Atkyn's Chancery Reports (<i>temp.</i> Hardwicke, 1736—54).
B. & Ad.	Barnewall & Adolphus's King's Bench Reports (1830—33).
B. & Al.	Barnewall & Alderson's King's Bench Reports (1818—23).
B. & C.	Barnewall & Cresswell's King's Bench Reports (1823—30).
B. & P.	Bosanquet & Puller's Common Pleas Reports (1796—1807).
B. & S.	Best & Smith's Queen's Bench Reports (1861 to present time).
Ba. & Be. ..	Ball & Beatty's Irish Chancery Reports (<i>temp.</i> Mannors, 1807—14).
Barn.	Barnardiston's Chancery Reports (<i>temp.</i> Hardwicke, 1740—41).
Be.	Beavan's Reports of Cases in the Rolls Court (<i>temp.</i> Langdale & Romilly, 1838—66).
Bing.	Bingham's Common Pleas Reports (1822—40).
H. Bl.	H. Blackstone's Common Pleas & Exchequer Reports (1788—96).
W. Bl.	W. Blackstone's King's Bench & Common Pleas Reports (1746—79).
Bli.	Bligh's House of Lords Reports (1819—20, 1827—36).
Br. & B.	Broderip & Bingham's Common Pleas Reports (1819—22).
Br. C.	W. Brown's Chancery Cases (<i>temp.</i> Thurlow & Loughborough, 1778—94).
Br. P.	J. Brown's Cases in the High Court of Parliament (1751—1800).
Bulst.	Bulstrode's King's Bench Reports (1609—38).

- Bur..... Burrow's King's Bench Reports (*temp.* Mansfield, 1756—72).
- C. B. Common Bench Reports in the Common Pleas (by Manning, Granger & Scott, 1845—65).
- C. & F. Clark & Finnelly's House of Lords' Cases (1834—46).
- C. M. & R... Crompton, Meeson & Roscoe's Exchequer Reports (1833—34).
- Ca. t. Fin. .. Chancery Reports (*temp.* Finch, 1673—80).
- Ca. t. Talb... Cases in Equity (*temp.* Talbot, 1734—37).
- Car. & P. .. Carrington & Payne's Nisi Prius Cases (1823—41).
- Ch. Cas. Cases in Chancery (1660—85).
- Ch. Rep. Reports in Chancery (1625—1710).
- Col. Collyer's Chancery Cases (*temp.* V. C. Knight Bruce, 1844—46).
- G. Coop. Sir George Cooper's Chancery Cases (*temp.* Eldon, 1815).
- Cowp. Cowper's King's Bench Reports (1774—78).
- Cox,..... Cox's Cases in Equity (1783—96).
- Cr. & J. Crompton & Jervis's Exchequer Reports (1830—31).
- Cr. & M.... Crompton & Meeson's Exchequer Reports (1832—33).
- Cr. & Ph. .. Craig & Phillip's Reports in Chancery (*temp.* Cottenham, 1840—41).
- Cro. Eliz. .. } Croke's King's Bench and Common Pleas Reports during
 Cro. Jac. } the Reigns of Elizabeth, James I. and Charles I. (1582
 Cro. Car. } —1641).
- Cur. Curteis's Ecclesiastical Reports (1834—44).
- D. F. & J. .. De Gex, Fisher & Jones's Chancery Reports (*temp.* Campbell, Westbury, and Lords Justices Bruce and Turner, 1859—62).
- D. J. & S. .. De Gex, Jones & Smith's Chancery Reports (*temp.* Westbury, Cranworth, and Lords Justices Bruce and Turner, 1863—65).
- D. M. & G... De Gex, Macnaghten & Gordon's Chancery Reports (*temp.* Truro, St. Leonards, Cranworth, and Lords Justices Cranworth, Bruce, Turner, 1851—57).
- D. & Ry..... Dowling & Ryland's King's Bench Reports (1822—1828).
- D. & Sw..... Deane & Swabey's Ecclesiastical Reports (1855—57).
- Dan. Daniell's Exchequer (Equity side) Reports (1817—20).
- De G. De Gex's Bankruptcy Reports (1845—48).
- De G. & J... De Gex & Jones' Chancery Reports (*temp.* Cranworth, Chelmsford and Campbell, and Lords Justices Bruce and Turner, 1856—59).
- De G. & S... De Gex & Smale's Chancery Reports (*temp.* V. C. Knight Bruce, Parker, 1846—52).
- Dick. Dickens's Reports in Chancery (1714—98).

Doug.	Douglas's King's Bench Reports (1779—85).
Dow,	Dow's House of Lords Cases (1813—18).
Dr. & S.	Drewry & Smale's Chancery Reports (<i>temp.</i> V. C. Kindersley, 1859—65).
Dr. & War...	Drury & Warren's Irish Chancery Reports (<i>temp.</i> Sugden, 1841—43).
Drew.	Drewry's Chancery Reports (<i>temp.</i> V. C. Kindersley, 1852—1859).
Dru.....	Drury's Irish Chancery Reports (<i>temp.</i> Sugden, 1843—44).
Dyer,	Dyer's Reports (K. B., C. P., Ex. and Chan.), (1513—18).
E. & B.	Ellis & Blackburn's Queen's Bench Reports (1852—59).
E. B. & E. ..	Ellis, Blackburn & Ellis's Queen's Bench Reports (1858).
Ea.	East's King's Bench Reports (1801—13).
Ecc.&Ad.Rep.	Ecclesiastical and Admiralty Reports by Spinks (1853—1855).
Ed.	Eden's Chancery Reports (<i>temp.</i> Northington, 1757—66).
Eq. Ca. Ab...	Abridgment of Cases in Equity (<i>temp.</i> Somers, Harcourt, Cowper, Macclesfield, &c. down to middle of 18th Century).
Exch.	Exchequer Reports (by Welsby, Hurlstone & Gordon, 1847—57).
Fin. (Ca. t.) .	Chancery Reports, <i>temp.</i> Finch (1673—80).
Gif.	Giffard's Chancery Reports (<i>temp.</i> V. C. Stuart, 1859—64).
H. & C.	Hurlstone & Coltman's Exchequer Reports (1862 to present time).
H. & M.	Hemming & Miller's Chancery Reports (<i>temp.</i> V. C. Wood, 1862—65).
H. & N.	Hurlstone & Norman's Exchequer Reports (1855—61).
H. L. C.	House of Lords Cases (by Clark, 1847—65).
Ha.	Hare's Chancery Reports (<i>temp.</i> V. C. Wigram, Knight Bruce, Turner and Wood, 1841—53).
Hag.	Haggard's Ecclesiastical Reports (1827—32).
Ir. C. L. Rep.	Irish Common Law Reports (1839 to present time).
Ir. Ch. Rep. .	Irish Chancery Reports (1839 to present time).
Ir. Jur.	The Irish Jurist.
J. & H.	Johnson & Hemming's Chancery Reports (<i>temp.</i> V. C. Wood, 1860—62).
J. & L.	Jones & Latouche's Irish Chancery Reports (<i>temp.</i> Sugden, 1844—46).
J. & W.	Jacob & Walker's Chancery Reports (<i>temp.</i> Eldon, 1819—21).
Jac.	Jacob's Chancery Reports (<i>temp.</i> Eldon, 1821—22).
Joh.	Johnson's Chancery Reports (<i>temp.</i> V. C. Wood, 1858—59).

- Jur. The Jurist (containing Reports of Cases in all the Courts, from 1837).
- K. & J. Kay & Johnson's Chancery Reports (*temp.* V. C. Wood, 1854—58).
- Kay, Kay's Chancery Reports (*temp.* V. C. Wood, 1853—54).
- Ke. Keen's Reports in the Rolls Court (*temp.* Langdale, 1836—39).
- Kei. Keilwey's Reports of Select Cases in the K. B. and C. P. (1278—1530).
- L. J. The Law Journal Reports (containing Cases in all the Courts, from 1823).
- L. R. The Law Reports (from 1865).
 L. R., H. L., House of Lords, English and Irish Appeals.
 " , Sc. App., " , Scotch Appeals.
 " , P. C., Privy Council Appeals.
 " , Ch., Chancery Appeals.
 " , Eq., Equity Cases, before the M. R. and V. C.
 " , Q. B., Cases in the Court of Queen's Bench.
 " , C. P., " " Common Pleas.
 " , Exch., " " Exchequer.
 " , Prob., " " Probate.
 " , Div., " " Divorce.
- L. T. The Law Times Reports (containing Cases in all the Courts, from 1843).
- Leon. Leonard's Reports of Cases in the Courts at Westminster (1553—1615).
- M. & C. Mylne & Craig's Chancery Reports (*temp.* Cottenham, 1835—41).
- M. D. & D... Montagu, Deacon & De Gex's Cases in Bankruptcy (1840—44).
- M. & Gr. .. Manning & Granger's Common Pleas Reports (1840—45).
- M. & K. Mylne & Keen's Chancery Reports (*temp.* Brougham and Leach, M. R., 1832—35).
- M. & M. Moody & Malkin's Nisi Prius Cases (1826—30).
- M. & Ry. .. Manning & Ryland's Reports of Magistrates' Cases in the K. B. (1828—30).
- M. & S. Maule & Selwyn's King's Bench Reports (1813—17).
- M. & W. Meeson & Welsby's Exchequer Reports (1836—47).
- M'C. & Y. .. M'Clelland's & Younge's Exchequer Reports (1825).
- M'Cl. M'Clelland's Exchequer Reports (1824).
- M'N. & G. .. Macnaghten & Gordon's Chancery Reports (*temp.* Cottenham, Truro, 1849—52).
- Macq. Macqueen's House of Lords Reports, Scotch Appeals (1851—65).
- Mad. Maddock's Chancery Reports (*temp.* V. C. E. Plumer, Leach, 1815—22).
- Mer. Merivale's Chancery Reports (*temp.* Eldon, 1815—17).

Milw.	Milward's Irish Ecclesiastical Reports.
Mod.	Modern Reports, or Select Cases in the Courts of K. B., Ch., C. P. and Ex. (1660—1755).
Moll.	Molloy's Irish Chancery Reports (<i>temp.</i> Hart, 1826—30).
Moo. P. C. ..	E. F. Moore's Privy Council Cases (1836—65).
J. B. Moo. ..	J. B. Moore's Common Pleas Reports (1817—27).
Moo. & P. ..	Moore & Payne's Common Pleas Reports (1827—30).
Moo. & S. ..	Moore & Scott's Common Pleas, Exchequer Chamber and House of Lords Reports (1831—34).
Mos.	Moseley's Chancery Reports (<i>temp.</i> King, 1726—30).
N. R.	The New Reports (containing Cases in all the Courts, 1862—65).
Nev. & M. ..	Nevile and Manning's King's Bench Reports (1832—36).
No. Cas.	Notes of Cases in the Ecclesiastical and Maritime Courts (1841—50).
P. W.	Peere Williams's Chancery Reports (<i>temp.</i> Somers, Cowper, Harcourt, Macclesfield, King, Talbot, 1695—1734).
Ph.	Phillips's Chancery Reports (<i>temp.</i> Lyndhurst, Cottenham, 1841—49).
Phillim.	Phillimore's Ecclesiastical Reports (1809—21).
Plow.	Plowden's Reports in the K. B., C. P. and Ex. (1551—78).
Pre. Ch.	Precedents in Chancery, a Collection of Cases from 1689—1722.
Pri.	Price's Exchequer Reports (1814—24).
Q. B.	Queen's Bench Reports (by Adolphus & Ellis, 1841—52).
R. & M.	Russell & Mylne's Chancery Reports (<i>temp.</i> Lyndhurst, Brougham, 1829—33).
R. P. & Conv. Cas.	Reports of Cases in the Law of Real Property and Conveyancing in all the Courts of Law and Equity (published at the Law Times Office, 1843—48).
Ld. Raym. ..	Raymond's (Lord) King's Bench and Common Pleas Reports (1693—1733).
Rep.	Coke's Reports, K. B., C. P., Ex., and Chan. (1572—1616).
Rep. Ch.	Reports in Chancery (1616—1710).
Rob.	Robertson's Ecclesiastical Reports (1844—50).
Roll. Rep. ..	Rolle's King's Bench Reports (1615—25).
Rus.	Russell's Chancery Reports (<i>temp.</i> Eldon, Lyndhurst, 1823—29).
S. & G.	Smale & Giffard's Chancery Reports (<i>temp.</i> V. C. Stuart, 1852—57).
S. & S.	Simons & Stuart's Chancery Reports (<i>temp.</i> V. C. E. Leach, 1822—26).
Salk.	Salkeld's King's Bench Reports, with Special Cases in Chancery, C. P. and Exchequer (1689—1712).

Sc.....	Scott's Common Pleas Reports (1834—45).
Sch. & Lef...	Schoales & Lefroy's Irish Chancery Reports (<i>temp.</i> Redesdale, 1802—6).
Sim.....	Simons's Chancery Reports (<i>temp.</i> V. C. E. Leach, Hart, Shadwell, V. C. Cranworth and Kindersley, 1826—52).
Stra.	Strange's Reports in Chancery, K. B., C. P., and Exch. (1715—48).
Sty.	Style's Reports in the Upper Bench (1646—55).
Sw.	Swanston's Chancery Reports (<i>temp.</i> Eldon, 1818—19).
Sw. & Tr...	Swabey & Tristram's Probate and Divorce Court Reports (1858—65).
T. R.	Term Reports in the King's Bench (by Durnford & East, 1785—1800).
T. & R.	Turner & Russell's Chancery Reports (<i>temp.</i> Eldon, 1822—24).
Talb. (Ca. t.)	Cases in Equity (<i>temp.</i> Talbot, 1734—37).
Tau.	Taunton's Reports of Cases in the C. P. and other Courts (1818—19).
Toth.	Tothill's Chancery Reports (1558—1649).
V. & B.	Vesey & Beames's Reports in Chancery (<i>temp.</i> Eldon, 1812—14).
Ven.	Ventris's Reports in the King's Bench and Common Pleas (1669—92).
Ver.	Vernon's Chancery Cases (<i>temp.</i> Finch, North, Jeffreys, Somers, Cowper, Harcourt, Macclesfield, 1680—1718).
Ves. s.	Vesey (senior), Reports in Chancery (<i>temp.</i> Hardwicke, 1746—55).
Ves. j.	Vesey (junior), Reports in Chancery (<i>temp.</i> Thurlow, Loughborough, Eldon, 1789—1817).
Ves.	
W. R.	The Weekly Reporter (containing Cases in all the Courts, from 1852).
P. W.	Peere Williams's Chancery Reports (1695—1734).
Wils.	Wilson's Reports in King's Bench and Common Pleas (1742—74).
Y. & C.	Younge & Collyer's Chancery Reports (<i>temp.</i> V. C. Knight Bruce, 1841—44).
Y. & C. Ex...	Younge & Collyer's Exchequer (Equity) Reports (<i>temp.</i> Lyndhurst, Abinger, 1834—1842).
Y. & J.	Younge & Jervis's Exchequer Reports (1827—30).
Yelv.	Yelverton's King's Bench Reports (1602—12).
You.	Younge's Exchequer (Equity) Reports (<i>temp.</i> Lyndhurst, 1830—32).

ABBREVIATIONS

Used in this Volume in the citation of Text-books; with the Editions to which reference is made.

Amos & Ferard, Fix- tures.	Amos & Ferard's Treatise on the Law of Fix- tures; 2nd edition, 1847.
Barrington, Stat.	Barrington's Observations on the more Ancient Statutes; 5th edition, 1795.
Bl. Comm.	Sir William Blackstone's Commentaries on the Laws of England; 16th edition, by Coleridge, 1825.
Broom, Maxims.....	Broom's Selection of Legal Maxims; 3rd edition, 1858.
Burn, Ecc. L.	Burn's Ecclesiastical Law; 9th edition, by R. Phil- limore, 1842.
Burt. Comp.	Burton's Compendium of the Law of Real Pro- perty; 7th edition, by Cooper, 1850.
Clayton, Elem. of Conv.	Clayton's Elements of Conveyancing; 1855.
Cod. Nap.	Code Napoléon.
Co. Litt.	Coke's Commentary upon Littleton; 19th edition, by Butler, 1832.
Com. Dig.	Comyn's Digest of the Laws of England; 5th edition, by Hammond, 1822.
Consol. Ch. Ord.	The Consolidated General Orders of the High Court of Chancery; published by authority, 1860.
Cr. Dig.	Cruise's Digest of the Laws of England respecting Real Property; 4th edition, by White, 1835.
Dart, V. & P.	Dart's Compendium of the Law and Practice of Vendors and Purchasers of Real Estate; 3rd edition, 1856.
Dav. Conc. Prec.	Davidson's Concise Precedents in Conveyancing; 4th edition, 1852; 6th edition, 1865.
Day. Conv.	Davidson's Precedents and Forms in Convey- ancing; 2nd edition, by Davidson, Wright & Waley, 1860—65.
Dav. Mart.	Davidson's Martin's Practice of Conveyancing, with Forms of Conveyancing.
Deane, Wills	Deane's Act for the Amendment of the Laws with respect to Wills; 1852.
Dibb	Dibb's Practical Guide to the Registration of Deeds and Wills in the West Riding of York- shire; 1846.

Edwards, Abr. Cas. Prerog. Ct.	Edward's Abridgment of Cases in the Prerogative Court, under the new Statute of Wills; 1846.
Fearne.....	Fearne's Essay on Contingent Remainders and Executory Devises; 10th edition, by Josiah W. Smith, 1844.
Fearne, Posth.	Fearne's Posthumous Works; edited by Shadwell, 1796.
Gale, Easements	Gale's Treatise on Easements; 3rd edition, by W. H. Willes, 1862.
Gilb. Ten.	Gilbert's Law of Tenures; 5th edition, by Watkins & Vidal, 1824.
Gilb. Uses	Gilbert's Law of Uses and Trusts; 3rd edition, by Sugden, 1811.
Godolph.....	Godolphin's Orphan's Legacy; 4th edition, 1701.
Hanson	Hanson on the Succession Duty Act, 1853, with the Decisions and Notes; 1865.
Hawkins, Constr. Wills	Hawkins' Concise Treatise on the Construction of Wills; 1863.
Hayes, Conv.	Hayes' Introduction to Conveyancing; 5th edition, 1840.
Hayes, Conc. Conv. ..	Hayes' Concise Conveyancer; 1st edition, 1830; 3rd edition, by W. B. Coltman, 1869.
Hayes, Lim. to Heirs in Tail.	Hayes' Essay on the Construction of Limitations to Heirs in Tail; 1829.
Hill, Trustees.....	Hill's Treatise on the Law relating to Trustees; 1845.
Hunter's Law of Property Act.	Hunter's Act to amend the Law of Property and to relieve Trustees; 1859.
Inst.....	Justiniani Institutiones (with English Introduction, Translation and Notes, by Sanders, 1853).
Jarm. Byth.	{ Jarman & Bythewood's Selection of Precedents, forming a System of Conveyancing; 3rd edition, by Sweet, 1841—53.
Jarm. Conv.	
Jarm. Wills	Jarman's Treatise on Wills; 3rd edition, by Wolstenholme & Vincent, 1861.
L. C. Eq.....	Leading Cases in Equity, by White & Tudor; 3rd edition, 1866.
L. C. R. P.	Leading Cases on Real Property, Conveyancing and the Construction of Wills and Deeds, by Tudor; 2nd edition, 1863.
Langley's Law of Property Act.	Langley's Reading of the Act to further amend the Law of Property and to relieve Trustees; 1860.
Lewin, Trusts	Lewin's Treatise on the Law of Trusts and Trustees; 5th edition, 1867.
Lewis, Perpet.....	Lewis's Treatise on the Law of Perpetuity, 1843; Supplement thereto, 1849.
Mart. Conv. Recital Book.	Martin's Conveyancer's Recital Book; 1834.
Morgan, Ch. Acts & Orders.	Morgan's Statutes, General Orders and Regulations relating to the Practice and Jurisdiction of the Court of Chancery; 4th edition, 1868.

Peachey, Settlements..	Peachey's Treatise on the Law of Marriage and other Family Settlements; 1860.
Perk.	Perkin's Conveyancing; a profitable Book, treating on the Laws of England principally as they relate to Conveyancing; 15th edition, by Greening, 1827.
Phil. Dom.	R. Phillimore's Law of Domicil; 1847.
Phil. Prin. Jurisp....	J. G. Phillimore's Principles of Jurisprudence.
Pow. Dev. by Jarm. . .	Powell's Essay on Devises; 3rd edition, by Jarman, 1827.
Prest. Conv.	Preston's Treatise on Conveyancing; 3rd edition, 1819.
R. P. Com. Rep.	Real Property Commission Reports; 1880.
Roll. Ab.	Rolle's Abridgment; 1668.
Rop. Leg.	Roper's Treatise on the Law of Legacies; 4th edition, by White, 1847.
Sand. Uses	Sanders' Essay on Uses & Trusts; 5th edition, by G. W. Sanders & Warner, 1844.
Scriv. Cop.	Scriven's Treatise on Copyhold, Customary Freehold & Ancient Demesne Tenure; 4th edition, by Stalman, 1846.
Shelf. Mortm.	Shelford's Treatise on the Law of Mortmain; 1836.
Shelf. R. P. Stat.	Shelford's Real Property Statutes passed in the reigns of William IV. and Victoria; 7th edition, 1863.
Shep. Touch.	Sheppard's Touchstone of Common Assurances; 7th edition, by Preston, 1820.
Smith, Ch. Pr.	The Practice of the Court of Chancery; 7th edition, by J. Sidney Smith & Alfred Smith, 1862.
Smith, L. C.	Smith's (J. W.) Leading Cases on various Branches of the Law; 6th edition, by Maude & Chitty, 1867.
Smith, Prin. Eq.	Smith's (J. Sidney) Treatise on the Principles of Equity; 1856.
Smith, R. & P. Prop. . .	Smith's (Josiah W.) Compendium of the Law of Real and Personal Property; 2nd edition, 1859.
Ste. Com.	Stephen's Commentaries on the Laws of England, founded on Blackstone; 4th edition, 1858.
Sto. Conf. Laws.	Story's Commentaries on the Conflict of Laws; 5th edition (Boston, U. S.), 1857.
Sugd. Gilb. Uses	Sugden's (Lord St. Leonards) Gilbert on Uses & Trusts; 3rd edition, 1811.
Sugd. Pow.	Sugden's Treatise on Powers; 8th edition, 1861.
Sugd. R. P. Stat.	Sugden's Essay on the Real Property Statutes; 2nd edition, 1862.
Sugd. V. & P.	Sugden's Treatise on the Law of Vendors & Purchasers of Estates; 14th edition, 1862.
H. Sugd. Wills	Henry Sugden's Essay on the Law of Wills; 1837.

Sweet, Cases on Sep. Estate.	Sweet's Cases on a Wife's Separate Estate & Equity to a Settlement out of her Equitable Property; 1840.
Sweet, Conc. Pr.	Sweet's Concise Precedents in Conveyancing; 2nd edition, 1845.
Sweet, Stat. Conv. 8 & 9 Vict.	Sweet's Statutes relating to Conveyancing of the Session 8 & 9 Victoriae, 1845. (A Supplement to the Concise Precedents.)
Sweet, Wills	Sweet's Statute of Wills; 1838.
Swinb.....	Swinburne on Testaments and Last Wills; 7th edition, by Powell, 1803.
Taylor, Evidence	J. Pitt Taylor's Treatise on the Law of Evidence; 5th edition, 1868.
Taylor, Med. Jurisp...	A. S. Taylor's Manual of Medical Jurisprudence; 4th edition, 1852.
Toll. Exors.	Toller's Law of Executors and Administrators; 7th edition, by Whitmarsh, 1838.
Trevor, Succession....	Trevor's Taxes on Succession; 2nd edition, 1860.
Tud. L. C. Eq.	Tudor's Leading Cases in Equity; 3rd edition, 1866.
Tud. L. C. R. P.	Tudor's Leading Cases on Real Property, Conveyancing and the Construction of Deeds and Wills; 2nd edition, 1863.
Vin. Ab.....	Viner's General Abridgment of Law and Equity; 2nd edition, 1791-94. Supplement to, 1799-1806.
Watk. Conv.	Watkins' Principles of Conveyancing; 9th edition, by White, 1845.
Watk. Cop.....	Watkins' Treatise on Copyholds; 4th edition, by Coventry, 1825.
Watters	Watters's Treatise on the Law as affected by the Statutes for the Amendment of the Law of Property and Relief of Trustees; 1862.
Westlake, Intern. Law	Westlake's Treatise on Private International Law, or the Conflict of Laws; 1858.
Wh. & Tud. L. C. Eq.	White & Tudor's Leading Cases in Equity; 3rd edition, 1866.
Wigram, Extr. Evidence.	Wigram's Examination of the Rules of Law respecting the Admission of Extrinsic Evidence in aid of the Interpretation of Wills; 3rd edition, 1840.
Wms. Exors.	Williams' (Sir E. V.) Treatise on the Law of Executors and Administrators; 6th edition, 1867.
Wms. Real Assets....	Williams' (Joshua) Essay on Real Assets; 1861.
J. Williams, R. P....	Williams' (Joshua) Principles of the Law of Real Property; 8th edition, 1868.
Yool, Waste	Yool's Essay on Waste, Nuisance and Trespass, 1863.

ADDENDA.

Page 34. As to presumption of revocation, when the testator became insane, see also *Sprigge v. Sprigge* (L. R., 1 Prob. 608).

„ 40. As to the “intention to the contrary” required by the 22nd section of the Wills Act, see *Re Steele*, *Re May*, *Re Wilson* (L. R., 1 Prob. 575). And as to declarations, *after* the destruction of a will, of an intention to revive an earlier will, see *Re Weston* (L. R., 1 Prob. 633).

„ 46. As to the retention of the specific nature of a residuary devise, see also *Gibbins v. Eyden* (L. R., 7 Eq. 371).

„ 114. See *Beaumont v. Oliveira*, on appeal (L. R., 4 Ch. App. 309).

„ 148. *Brickenden v. Williams* is now reported (L. R., 7 Eq. 310).

„ 161. *Mills v. Trumper*, on appeal, is now reported (L. R., 4 Ch. App. 320).

„ 302. *Stuart v. Cockerell* is now reported (L. R., 7 Eq. 363).

„ 326. See *Beaumont v. Oliveira*, on appeal (L. R., 4 Ch. App. 309).

„ 423. See also *Re Baily* (L. R., 1 Prob. 628), following *Re Lowe*.

„ 533. *Sharpe v. Crispin* is now reported (L. R., 1 Prob. 611).

„ 534. As to the domicile of persons holding consular appointments, see *Sharpe v. Crispin* (L. R., 1 Prob. 611).

THE NEW STATUTE OF WILLS.

1 VICT. CAP. 26.

An Act for the Amendment of the Laws with respect to Wills. [3rd July, 1837.]

EXPLANATION OF TERMS.

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal and Commons in this present parliament assembled, and by the authority of the same, That the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows: (that is to say,) the word "will" shall extend to a testament, and to a codicil, and to an appointment by will or by writing in the nature of a will in exercise of a power; and also to a disposition by will and testament or devise of the custody and tuition of any child, by virtue of an Act passed in the twelfth year of the reign of King Charles the Second, intituled "An Act for taking away the Court of Wards and Liveries, and Tenures in Capite and by Knights Service, and Purveyance, and for settling a Revenue upon his Majesty in lieu thereof," or by virtue of an Act passed in the parliament of Ireland in the fourteenth and fifteenth years of the reign of King Charles the Second, intituled "An Act for taking away the Court of Wards and Liveries, and Tenures in Capite and by Knights

Meaning of certain words in this Act. (a)

12 Car. 2, c. 24.

14 & 15 Car. 2 (Ireland).

(a) The marginal notes to the sections of the Act are not in all cases identical with the marginal notes printed by the Queen's printer. That the latter form no part of the statute, and are not binding as an explanation or construction of the sections, see *Claydon v. Green* (L. R., 3 C. P. 511).

Sect. 1.

"Real estate:"

"Personal estate:"

Number.

Gender.

Service," and to any other testamentary disposition; and the words "real estate" shall extend to manors, advowsons, messuages, lands, tithes, rents and hereditaments, whether freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether corporeal, incorporeal or personal, and to any undivided share thereof, and to any estate, right or interest (other than a chattel interest) therein; and the words "personal estate" shall extend to leasehold estates and other chattels real, and also to monies, shares of government and other funds, securities for money (not being real estates), debts, choses in action, rights, credits, goods, and all other property whatsoever which by law devolves upon the executor or administrator, and to any share or interest therein; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

REPEAL CLAUSE.

Repeal of the Statutes of Wills, 32 H. 8, c. 1, and 34 & 35 H. 8, c. 5.

10 Car. 1, Sess. 2, c. 2 (Ireland).

Sects. 5, 6, 12, 19, 20, 21 & 22 of the Statute of Frauds, 29 Car. 2, c. 8.

7 W. 3, c. 12 (Ireland).

II. And be it further enacted, That an Act passed in the thirty-second year of the reign of King Henry the Eighth, intituled, "The Act of Wills, Wards, and Primer Seisins, whereby a Man may devise two parts of his Land;" and also an Act passed in the thirty-fourth and thirty-fifth years of the reign of the said King Henry the Eighth, intituled "The Bill concerning the Explanation of Wills;" and also an Act passed in the parliament of Ireland, in the tenth year of the reign of King Charles the First, intituled "An Act how Lands, Tenements, etc., may be disposed by Will or otherwise, and concerning Wards and Primer Seisins;" and also so much of an Act passed in the twenty-ninth year of the reign of King Charles the Second, intituled "An Act for Prevention of Frauds and Perjuries," and of an Act passed in the parliament of Ireland in the seventh year of the reign of King William the Third, intituled "An Act for Prevention of Frauds and Perjuries," as relates to devises or bequests of lands or tenements, or to the revocation or alteration of any devise in writing of any lands, tenements, or hereditaments, or any clause thereof, or to the devise of any estate pur autre vie, or to any such

Sect. 2.

estate being assets, or to nuncupative wills, or to the repeal, altering or changing of any will in writing concerning any goods or chattels or personal estate, or any clause, devise or bequest therein; and also so much of an Act passed in the fourth and fifth years of the reign of Queen Anne, intituled "An Act for the Amendment of the Law and the better Advancement of Justice," and of an Act passed in the parliament of Ireland in the sixth year of the reign of Queen Anne, intituled "An Act for the Amendment of the Law and the better Advancement of Justice," as relates to witnesses to nuncupative wills; and also so much of an Act passed in the fourteenth year of the reign of King George the Second, intituled "An Act to amend the Law concerning Common Recoveries, and to explain and amend an Act made in the twenty-ninth year of the reign of King Charles the Second, intituled 'An Act for Prevention of Frauds and Perjuries,'" as relates to estates pur autre vie; and also an Act passed in the twenty-fifth year of the reign of King George the Second, intituled "An Act for avoiding and putting an end to certain Doubts and Questions relating to the Attestation of Wills and Codicils concerning Real Estates in that part of Great Britain called England, and in his Majesty's Colonies and Plantations in America," except so far as relates to his Majesty's colonies and plantations in America; and also an Act passed in the parliament of Ireland in the same twenty-fifth year of the reign of King George the Second, intituled "An Act for the avoiding and putting an end to certain Doubts and Questions relating to the Attestation of Wills and Codicils concerning Real Estates;" and also an Act passed in the fifty-fifth year of the reign of King George the Third, intituled "An Act to remove certain Difficulties in the Disposition of Copyhold Estates by Will," shall be and the same are hereby repealed, except so far as the same Acts or any of them respectively relate to any wills or estates pur autre vie to which this Act does not extend.

Sect. 14 of 4 & 5 Anne, c. 16.

6 Anne, c. 10 (Ireland).

Sect. 9 of 14 G. 2, c. 20.

25 G. 2, c. 6 (except as to colonies).

25 G. 2, c. 11 (Ireland).

55 G. 3, c. 192.

GENERAL ENABLING CLAUSE.

III. And be it further enacted, That it shall be lawful for every person (*b*) to devise, bequeath, or dispose of, by his will

All property may be disposed of by will;

(*b*) The Act does not affect the will of an alien, and such a will would not become operative by his subsequent naturalization (Sugd. R. P. Stat.

Alien, or person domiciled abroad.

Sect. 3.

comprising
customary
freeholds and
copyholds
without sur-
render and
before admit-

executed in manner hereinafter required, all real estate and all personal estate (*c*) which he shall be entitled to, either at law or in equity (*d*), at the time of his death (*e*), and which, if not so devised, bequeathed, or disposed of, would devolve upon the heir-at-law, or customary heir of him, or, if he became entitled by descent, of his ancestor, or upon his executor or administrator (*f*); and that the power hereby given shall extend to all real estate of the nature of customary freehold or tenant right, or customary or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his will, or

331). And the Act applies only to persons having an English domicile (*Bremer v. Freeman*, 10 Moo. P. C. 306); but see now 24 & 25 Vict. c. 114, in the Appendix.

Specific le-
gatee of chose
in action must
still sue in
name of exe-
cutor.

(*c*) By this section the practice is not altered with respect to suing at law upon a chose in action bequeathed to a legatee; see *Bishop v. Curtis* (17 Jur. 23, Q. B.), in which case it was held that the specific legatee of a promissory note, though the executors had assented to the bequest, must sue upon the note in the name of the executors.

What in-
terests devi-
sable.

(*d*) A person in possession of land without other title has a devisable interest (*Asher v. Whitlock*, L. R., 1 Q. B. 1). It would seem that a purchaser who has made, but not signed, a contract for the purchase of real estate, the terms of which are proved, and which is signed by the vendor, has a devisable interest in that estate (*Morgan v. Holford*, 1 S. & G. 101). And a person who has sold and conveyed an estate under circumstances which entitle him in equity to have the sale set aside, has in the estate an interest of such a nature as to be devisable, even by a will before the Wills Act (*Gresley v. Mousley*, 4 De G. & J. 78). See also *Stump v. Gaby* (2 D. M. & G. 623).

Contingent
estates.

(*e*) Under both the old and the new law a contingent fee under a shifting clause is devisable, even though the contingency happen after the death of the testator, and is of such a nature that he, personally, could never have derived any benefit from it (*Ingilby v. Amcotts*, 21 Be. 585).

As to the exe-
cution of a
will, so as to
exclude the
lord's title by
escheat for
want of heirs.

(*f*) It will be seen that the section of the Statute of Frauds, which required the execution of a will of freehold estate to be attested by three or four witnesses, is, with other Acts, repealed by sect. 2 of the New Wills Act, "except so far as the same Acts relate to any wills to which this Act does not extend;" and further, that sect. 3 of the New Wills Act applies only to the devise of property which, if not so devised, would devolve upon the heir-at-law or customary heir of the testator or his ancestor, or upon the executor or administrator of the testator. Upon the construction of these two clauses, taken together, it has been doubted whether, in the case of a testator dying without heirs, it would not, to prevent an escheat to the lord, be necessary that the will should be executed pursuant to the old law (*J. Williams*, R. P. 120, n. (*u*)).

notwithstanding that, being entitled as heir, devisee, or otherwise, to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same, in consequence of the want of a custom to devise or surrender to the use of a will or otherwise, could not at law have been disposed of by will if this Act had not been made, or notwithstanding that the same, in consequence of there being a custom that a will or a surrender to the use of a will should continue in force for a limited time only, or any other special custom, could not have been disposed of by will, according to the power contained in this Act, if this Act had not been made; and also to estates pur autre vie, whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament; and also to all contingent, executory, or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created, or under any disposition thereof by deed or will; and also to all rights of entry for conditions broken, and other rights of entry; and also to such of the same estates, interests and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will.

Sect. 3.

tance, and also such of them as could not be devised before the Act;

estates pur autre vie;

contingent interests;

rights of entry; and property acquired after execution of the will.

FEEES ON COPYHOLDS.

IV. Provided always, and be it further enacted, That where any real estate of the nature of customary freehold, or tenant right, or customary or copyhold, might by the custom of the manor of which the same is holden, have been surrendered to the use of a will, and the testator shall not have surrendered the same to the use of his will, no person entitled or claiming to be entitled thereto by virtue of such will shall be entitled to be admitted, except upon payment of all such stamp duties, fees and sums of money as would have been lawfully due and pay-

As to the fees and fines payable by devisees of customary and copyhold estates.

Sect. 4.

able in respect of the surrendering of such real estate to the use of the will, or in respect of presenting, registering, or enrolling such surrender, if the same real estate had been surrendered to the use of the will of such testator : Provided also, that where the testator was entitled to have been admitted to such real estate, and might, if he had been admitted thereto, have surrendered the same to the use of his will, and shall not have been admitted thereto, no person entitled or claiming to be entitled to such real estate in consequence of such will shall be entitled to be admitted to the same real estate by virtue thereof, except on payment of all such stamp duties, fees, fine (g) and sums of

Copyholds,
fine, when
payable.

(g) It would seem that the lord is entitled to refuse admittance to the devisee of an unadmitted testator until after payment of the fine which would have been payable on the admittance of the testator. The general rule, however, is that the lord's fine is not due until the admittance of his tenant (1 Scriv. Cop. ch. 7; *Reg. v. Wellesley*, 2 E. & B. 924; *Reg. v. Lord of Manor of Wanstead*, 18 Jur. 311), and with this rule, in respect of the fine due on the admittance of the devisee himself, the Wills Act does not interfere; for the latter fine, the lord is left to his ordinary remedy, to be enforced, if necessary, after admittance (compare Sweet, Wills, 133, n.) The *obiter dicta* of Lord Campbell and Mr. Justice Erle in *Reg. v. Lady of Manor of Wilberton* (29 L. T. 126), seem to countenance the view that, in cases arising under sect. 4, both fines are payable before the admittance of the devisee. The point was not expressly decided; and it is submitted that such a view is not supported by authority or by the terms of the Wills Act.

The lord's remedy for a fine, after admittance of the tenant, is by action of debt or assumpsit (*Shuttleworth v. Garnet*, 3 Mod. 240).

See also *Lord Londesborough v. Foster* (3 B. & S. 805).

As to the copyholder's remedies against the lord, see *Barnett v. Guilford* (11 Exch. 19); *Andrews v. Hulse* (4 K. & J. 392).

Where the surrenderee of the reversion of copyholds died before admission, and before the reversion fell into possession, his heir on admission was held liable to pay one fine only (*Garland v. Alston*, 3 H. & N. 390).

Fine payable
by joint-
tenants.

By the disclaimer of two out of three devisees who are joint-tenants, only one fine becomes payable to the lord (*Wellesley v. Withers*, 4 E. & B. 750); so also if all the devisees in trust but one were to release to that one; but so to vest the legal estate in a single trustee is in strictness a breach of trust, and the expected advantage might, by the death of the admitted trustee in the lifetime of his co-trustees, become a loss (see *Lewin Trusts*, 192).

As to the mode of assessing the fine payable on the admittance of joint-

money as would have been lawfully due and payable in respect of the admittance of such testator to such real estate, and also of all such stamp duties, fees and sums of money as would have been lawfully due and payable in respect of surrendering such real estate to the use of the will, or of presenting, registering, or enrolling such surrender, had the testator been duly admitted to such real estate, and afterwards surrendered the same to the use of his will; all which stamp duties, fees, fine, or sums of money due as aforesaid shall be paid in addition to the stamp duties, fees, fine, or sums of money due or payable on the admittance of such person so entitled or claiming to be entitled to the same real estate as aforesaid.

COPYHOLDS.

V. And be it further enacted, That when any real estate of the nature of customary freehold or tenant right, or customary or copyhold, shall be disposed of by will, the lord of the manor or reputed manor of which such real estate is holden, or his steward, or the deputy of such steward, shall cause the will by which such disposition shall be made, or so much thereof as shall contain the disposition of such real estate, to be entered on the court rolls of such manor or reputed manor; and when

Wills or extracts of wills of customary freeholds and copyholds to be entered on the court rolls;

tenants, see *Wilson v. Hoare* (10 A. & E. 241); *Sheppard v. Woodford* (5 M. & W. 608).

As to the mode of ascertaining the "improved value" of the copyhold tenement, see *Richardson v. Kensit* (5 M. & Gr. 485).

Improved value.

The fines and expenses of administration of trustees of settled copyholds are payable by tenant for life and remaindermen in proportion to their respective interests (*Carter v. Sebright*, 26 Be. 374). And where a person becomes entitled under a will to copyholds, whether in remainder originally vested, or in remainder contingent or by executory devise which has become vested by the happening of the contingency, he comes in directly under the will, and therefore, as between himself and the lord, is entitled to the benefit of the admittance of the first devisee under the will (*Randfield v. Randfield*, 1 Dr. & S. 310).

Tenant for life and remainderman.
Executory devise.

As to heriots, see *Garland v. Jekyl* (2 Bing. 273); *Corporation of Basingstoke v. Bolton* (1 Drew. 270; 3 Drew. 50); *Padwick v. Tyndale* (7 W. R. 53).

Heriots.

As to stewards' fees, see *Evans v. Upsher* (16 M. & W. 675); *Cooper v. Norfolk Railway Company* (3 Exch. 546); *Treherne v. Gardner* (5 E. & B. 913; 4 W. R. 281).

Stewards' fees.

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any trusts are declared by the will of such real estate, it shall not be necessary to enter the declaration of such trusts, but it shall be sufficient to state in the entry on the court rolls that such real estate is subject to the trusts declared by such will; and when any such real estate could not have been disposed of by will if this Act had not been made, the same fine, heriot, dues, duties and services shall be paid and rendered by the devisee as would have been due from the customary heir, in case of the descent of the same real estate; and the lord shall as against the devisee of such estate have the same remedy for recovering and enforcing such fine, heriot, dues, duties and services as he is now entitled to for recovering and enforcing the same from or against the customary heir in case of a descent.

and the lord to be entitled to the same fine, &c. when such estates were not previously devisable as he would have been from the heir in case of descent.

ESTATES PUR AUTRE VIE.

Estates pur autre vie.

VI. And be it further enacted, That if no disposition by will shall be made of any estate pur autre vie of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee-simple; and in case there shall be no special occupant of any estate pur autre vie, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator, either by reason of a special occupancy, or by virtue of this act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate (*h*).

Estates pur autre vie, where a special occupant, though named, never comes into existence.

(*h*) Under this section, the legal personal representative of the deceased owner of estates pur autre vie is entitled to those estates, not only in the case where no special occupant is named in the limitations, but also in the case where a special occupant is named, but never comes into existence. See *Reynolds v. Wright* (25 Be. 100; 2 D. F. & J. 590); in which case the devise was of leaseholds for lives to trustees, in trust for "A. and his heirs:" A. died intestate and illegitimate; and it was held that the leaseholds belonged to the administrator of A., and not beneficially to the devisees in trust. See also, as to estates pur autre vie, *Northen v. Carnegie* (4 Drew. 587); *Pickersgill v. Grey* (30 Be. 352); *Plunket v. Reilly* (2 Ir. Ch. Rep. 585).

AGE OF TESTATOR.

VII. And be it further enacted, That no will made by any person under the age of twenty-one years shall be valid (*i*). No will of a person under age valid;

MARRIED WOMEN.

VIII. Provided also, and be it further enacted, That no will made by any married woman shall be valid, except such a will as might have been made by a married woman before the passing of this Act (*k*). nor of a feme covert, except such as might have been previously made.

EXECUTION OF WILLS.

IX. And be it further enacted, That no will shall be valid unless it shall be in writing (*l*), and executed in manner here- Will to be in writing, and signed or ac-

(*i*) The will of an infant does not become operative by his subsequently attaining his majority (Sugd. R. P. Stat. 330); nor can the section be evaded by means of a power expressed to be exerciseable by a will made during infancy. Age of testator.

From the cases of *Re Farquhar* (4 No. Cas. 651) and *Re M'Murdo* (L. R., 1 Prob. 540), it would appear that a soldier on active service, or a seaman at sea (see note to sect. 11, *post*), can, though a minor, make a will of personalty.

(*k*) The effect of this section is to leave the legal testamentary *status* of a married woman (who has attained the age of twenty-one years) exactly as it stood under the old law. Thus a married woman's devise of real estate must now, as then, be made in the exercise of a trust or power created for the purpose, and her capacity to bequeath personalty not settled to her separate use must still be derived from the licence and authority of her husband. The Act gives her no new power (Sugd. R. P. Stat. 331). But there is a distinction between the testamentary power of a married woman and the effect and operation of her testamentary appointment; no greater testamentary power is conferred by the Act than she before possessed; personally she acquires no enlarged capacity; but an effect and operation may be given under the statute to a testamentary instrument executed by a married woman which may make that instrument a valid exercise of a power existing at the time of her death, which before the Act it would not have been held to be (*Thomas v. Jones*, 2 J. & H. 475; on appeal, 1 D. J. & S. 63). Compare notes to ss. 24, 27, *post*. Testamentary *status* of married woman.

(*l*) A will may (Deane, Wills, 73) be written upon any substance (1 Wms. Exors. 106), and with any material; but it is advisable that it should be written on vellum, parchment or paper (Shep. Touch. 54); and to prevent any doubt or question as to the authenticity of the document, the writing should throughout be by the same hand and in ink of one Will—upon what substance and how to be written.

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knowledge
in the pre-
sence of two

inafter mentioned ; that is to say, it shall be signed at the foot

colour (*Greville v. Tylee*, 7 Moo. P. C. 320; *Birch v. Birch*, 1 Rob. 675, *post*, sect. 21, n.; and see *Re Bacon*, 3 No. Cas. 645).

Will may be
written in
pencil.

Formerly pencil writings, as distinguished from writings in ink, were held to be deliberative (Deane, Wills, 73). But under this statute a will may be written and signed in pencil (Sugd. R. P. Stat. 351, 352; *Gregory v. Queen's Proctor*, 4 No. Cas. 623). In *Bateman v. Pennington* (3 Moo. P. C. 227), Lord Brougham said, "All the cases show, that the signing in pencil affords a *prima facie* presumption that the act is only deliberative; yet it may be shown to be otherwise." In that case the testator had filled up the date of his will, and also signed it, in pencil, the body of the will being in ink. His signature was preceded by the words, "In case of accidents I sign this my will." The testator died suddenly, and probate was allowed of the will so executed.

Signature in
pencil by the
testator.

Printed will,
good.

A will the body of which is printed from type, or partly written and partly printed, is valid (see 2 Rob. 115, n.)

In words, or
cypher.

A will may be written or printed in any language, and either in words at length or contracted, or in figures, so that the testator's wishes are clear and unambiguous (Deane, Wills, 73); or in numbers and letters explained by a key (*East v. Twyford*, 4 H. L. C. 517; 9 Ha. 713). If a will be in a foreign language, resort must be had to the foreign law or language for the purpose of deciding on the meaning of the particular words used in the will; but having so ascertained the meaning of the terms, the law of the testator's domicile governs the construction of the instrument so far as concerns personal estate (see *Martin v. Lee*, 14 Moo. P. C. 142; 4 L. T., N. S. 657). See the note on domicile, in the Appendix.

Form unim-
portant.

An instrument, whatever may be its form, from which the intention of the maker can be gathered, that it is to affect the destination of his property after his death, will, if properly attested, be held to be testamentary (1 Wms. Exors. 99); for example, an order upon testator's bankers, attested by two witnesses (*Jones v. Nicolay*, 2 Rob. 293; 14 Jur. 675; *Re Marsden*, 1 Sw. & Tr. 542; 36 L. T. 87); a duly attested instrument in the form of a deed (*Re Montgomery*, 5 No. Cas. 99; 8 L. T. 294; *Doe v. Cross*, 8 Q. B. 714; *Re Morgan*, L. R., 1 Prob. 214); or a letter (*Re Mundy*, 2 Sw. & Tr. 119; 9 W. R. 171). And the testator's intention that such an instrument should operate as a will may be proved by parol evidence (*Re Webb*, 3 Sw. & Tr. 482; *Re English*, *ib.* 586; *Cock v. Cooke*, L. R., 1 Prob. 241). But where a person claims probate of a paper signed and attested, but not on the face of it clearly testamentary, the burden of proof is on that person to satisfy the Court that it was executed *animo testandi* (*Thorncroft v. Lashmar*, 2 Sw. & Tr. 479; 8 Jur., N. S. 595; 10 W. R. 783); and it is only to give effect to the intention that an instrument, not testamentary in form, will be held to bear that character (see *Patch v. Shore*, 2 Dr. & S. 589, and cases there cited). See also 1 Jarm. Wills, ch. 2.

Draft upon a
banker.

Deed.

Letter.

"Wishes."

An expression of the "wishes" of the writer, duly signed and attested

(*Re Lowrey*, 5 No. Cas. 619), has been admitted to probate. But see *Coventry v. Williams* (3 Cur. 787).

Where a clause is introduced into a will by fraud (*Allen v. M'Pherson*, 1 H. L. C. 191), or *per incuriam*, the testator not having given instructions for, and being ignorant of the existence of, such clause (*Re Duane*, 2 Sw. & Tr. 590; 6 L. T., N. S. 788), it forms no part of the will of the testator, and probate will be granted of the remainder of the will. But if the will were read over to the testator before execution, a clause cannot be excluded from probate, even though inserted by inadvertence (*Guardhouse v. Blackburn*, L. R., 1 Prob. 109).

Clause introduced by fraud, or *per incuriam*.

A testamentary paper duly executed is entitled to probate, although not intended to operate, and not becoming operative, until some time after the testator's death (*Re Newns*, 7 Jur., N. S. 688).

A duly executed paper, testamentary on the face of it, may be excluded from probate by parol evidence clearly proving that it was not intended by the deceased to affect the disposition of his property after his death (*Lister v. Smith*, 3 Sw. & Tr. 282).

A will may be made to take effect on a contingency, and if the contingency does not happen, the will ought not to be admitted to probate (1 Jarm. Wills, 12). But the Court is unwilling to refuse probate, unless it is clear that the testator intended the will to be operative only in a certain event or during a certain period (*Re Dobson*, L. R., 1 Prob. 88); and a will, contingent in terms, but executed after the event, is thereby rendered absolute (*Re Canthron*, 3 Sw. & Tr. 417). Unattested memoranda, written subsequently to the execution of the will, will not be admitted as evidence of the contingent nature of the will (*Stockwell v. Ritherdon*, 1 Rob. 661). A will expressed to take effect only upon an event which does not happen, cannot be established by evidence of the testator's intention to adhere thereto (*Re Winn*, 2 Sw. & Tr. 147; 7 Jur., N. S. 764; 9 W. R. 852; *Roberts v. Roberts*, 2 Sw. & Tr. 337); but a codicil expressed to take effect only upon an event which does not happen, operates as a re-execution of a will therein expressly referred to, and on that account is entitled to probate (*Re Da Silva*, 2 Sw. & Tr. 315). In the case of *Doe v. Haslemood* (10 C. B. 544), the testator made his will in favour of a nephew, but with a proviso in favour of the child with which his wife was then pregnant, if such child should be born after the testator's death; the child was, in fact, born in the testator's lifetime, and the Court of C. P. held that, in such a case, the testator did not contemplate the birth of a child in his lifetime, and did not intend to provide by his will for a child so born; the proviso in the will was made in contemplation of a particular combination of circumstances, which not having happened, the proviso failed. See, however, 1 Jarm. Wills, 506.

Contingent will.

Wills of more than one sheet are usually written on one side only of brief paper, the sheets being fastened together (though this fastening is not absolutely necessary, *Gregory v. Queen's Proctor*, 4 No. Cas. 639) at one of the

Blanks.

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Blanks.

corners, and every alternate page being left blank. To this plan there is no objection, as the Act does not require a will to be written continuously (*Re Corder*, 1 Rob. 669; 12 Jur. 966). And even if there is a blank in the body of the writing, as in *Corneby v. Gibbon* (1 Rob. 705; 6 No. Cas. 679), where the blank left was half a page, the will is valid. See also *Kirby's Case* (6 No. Cas. 693). But this shows the weakness of the objection, which before the passing of 15 & 16 Vict. c. 24, was raised to a space being left between the conclusion of the will and the signature (Sugd. R. P. Stat. 335); and if a will is prepared with blanks, and those blanks are filled up in the handwriting of the testator, the presumption of law is that they were supplied before the execution of the will (*Birch v. Birch*, 1 Rob. 675; 12 Jur. 1050).

Filled up in testator's handwriting.

Construction by a Court of Equity of a will of which probate has been granted in blank.

When probate has been granted of a will containing many blank spaces, a Court of Equity has no power to alter any of the words of the will as proved, so as to make sense of that which, without such alteration, is nonsense (*Taylor v. Richardson*, 2 Drew. 16). See also *Mason v. Bateson* (26 Be. 404); *Edmunds v. Waugh* (4 Drew. 275); *Greig v. Martin* (7 W. R. 315).

Incorporation of documents. They must be in existence and clearly identified.

Any written document in existence at the execution of a will (*Rogers v. Goodenough*, 2 Sw. & Tr. 342; *Re M' Cabe*, 2 Sw. & Tr. 474; 10 W. R. 848; *Van Straubenzee v. Monck*, 3 Sw. & Tr. 6; 11 W. R. 109) may be incorporated with, and made to form part of, the will (*Allen v. Maddock*, 11 Moo. P. C. 427; D. & Sw. 325; 6 W. R. 825; *Sheldon v. Sheldon*, 1 Rob. 88; *Ferraris v. Marquis of Hertford*, 1 Cur. 468). But the incorporated instrument must be clearly identified (*Allen v. Maddock*, *supra*; *Re Brewis*, 3 Sw. & Tr. 473); and, for the purpose of such identification, parol evidence was, before 1838, and is now, admissible (*ib.*); and if, in the existing circumstances, the identity is proved, it is no objection that, by possibility, circumstances might have existed, in which the instrument could not have been identified (*ib.*). But the principle of *Allen v. Maddock* will not be extended (*Re Greves*, 1 Sw. & Tr. 250; 7 W. R. 86). If the will does not describe the document as then existing, parol evidence will not be admitted to prove its existence (*Re Sunderland*, L. R., 1 Prob. 198; *Re Dallow*, *ib.* 189). But where a will, if read as speaking at the date of a codicil, contains language which would operate as an incorporation, the document, though not in existence until after the execution of the will, is entitled to probate by force of the codicil (*Re Lady Truro*, *ib.* 201).

Incorporation by the words "ratify and confirm."

Incorporated instruments may be invalid of themselves.

The words "ratify and confirm," used by a testator in his will, are sufficient to render a deed of settlement to which they are applied part of the will (*Sheldon v. Sheldon*, 1 Rob. 89); see also *Stump v. Gaby* (2 D. M. & G. 623); and it is unimportant that the incorporated document is voidable (*Stump v. Gaby*, *sup.*), or invalid (*Re Smart*, 4 No. Cas. 39; *Swete v. Pidsley*, 6 No. Cas. 189; *Re Willesford*, 3 Cur. 77; *Re Hunt*, 2 Rob. 622; 17 Jur. 720). In *Re Bosanquet* (14 Jur. 964), an unattested document, purporting to exercise a power of appointment, was held to be incor-

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or end thereof (*m*), by the testator (*n*), or by some other person

witnesses at one time, who attest.

porated with a will; and in the case *Re Countess of Durham* (3 Cur. 57), the revoked will of another person, and in *Re Hally* (5 No. Cas. 510), a letter, were respectively held to be well incorporated with and to form part of the wills in which they were referred to. But a deed referred to as "made" by the testator, but in fact not executed by him, was held not to be incorporated with his will (*Re Edwards*, 6 No. Cas. 306); and alterations unaccounted for in a duly identified and incorporated document were excluded from probate (*Svete v. Pidsley*, 6 No. Cas. 189).

Unexecuted deed; when not incorporated.
Unidentified alterations in incorporated document.

In *Re Bacon* (3 No. Cas. 645) a schedule of books, and in *Re Ash* (D. & Sw. 181) a list of plate, written on the same sheet as the will, were respectively held to be well incorporated. But see *Re Warner* (10 W. R. 566).

In the following cases the identity was held to be insufficiently shown, and the instruments intended to be referred to were not made parts of the respective wills (*Collier v. Langebeare*, 1 No. Cas. 369; *Re Astell*, 5 No. Cas. 489, n.; *Re Baldwin*, *ib.* 293; *Re Skair*, *ib.* 57; *Re Hakewill*, D. & Sw. 14; 4 W. R. 304; *Re Sotheron*, 2 Cur. 831; *Re Countess of Pembroke*, D. & Sw. 182).

Insufficient identity.

Strictly, all papers entitled to probate ought to receive probate; but in the case of a will referring to and incorporating a deed in the possession of persons (trustees for example) who will not give up the deed, probate will be passed of the will alone, without a deposit of the original deed (*Sheldon v. Sheldon*, 1 Rob. 88; *Re Battersbee*, 2 Rob. 439; *Re Sibthorp*, L. R., 1 Prob. 106); but a notarial copy, if obtainable, will be deposited in the registry, and a similar copy will form part of the probate (*Re Dickins*, 3 Cur. 61; but see *Re Dundas*, 1 N. R. 569; *Re Marquis of Lansdowne*, 3 Sw. & Tr. 194; 11 W. R. 749). In *Re Countess of Limerick* (2 Rob. 313) probate was granted of a will with extracts from a document referred to, but not recited, in the will.

Incorporated documents, probate of.

(*m*) The will shall be signed "at the foot or end thereof." The litigation on this branch of the 9th section has, since the passing of the Act 15 & 16 Vict. c. 24 (*post*, p. 21), almost ceased. The last-mentioned Act being retrospective (except under the circumstances referred to in the 2nd section) as well as prospective, the cases decided between the 1st January, 1838, and the 17th June, 1852 (when the amending Act came into operation), on the position of the testator's signature, have not now much practical value, except that as to all wills which the Court had pronounced to be defectively executed the parties interested are, by sect. 2, shut out from the benefits of the amending Act (16 Jur. 602, n.) The cases will be found collected in Sugd. R. P. Stat. c. 7, s. 1, 1st ed.; Deane, Wills, 71 *et seq.*; and Edwards' Abr. Cas. Prerog. Ct.

Signature at the foot or end of the will.

(*n*) The will shall be signed "by the testator."

Testator, signature of.
His knowledge of the contents of the will.

It is essential to the validity of a will that, at the time of signing, the testator should know and approve of its contents (*Hastilow v. Stobie*, L. R.,

1 Prob. 64); but proof of the actual reading over of the document to him is not necessary (*Mitchell v. Thomas*, 6 Moo. P. C. 137; 12 Jur. 967). The onus of proof of the genuineness and authenticity of a will lies on the party propounding it, and if the conscience of the judge is not satisfied on these points he is bound to refuse probate (*Baker v. Batt*, 2 Moo. P. C. 317); and this burthen is discharged by proof of capacity and the fact of execution of the will, from which knowledge and approval of its contents by the testator will be presumed (*Barry v. Butlin*, 2 Moo. P. C. 480; *Browning v. Budd*, 6 Moo. P. C. 430); but that presumption may be rebutted by circumstances (*ib.*)

Blind testator.

In the case of a blind testator it is highly desirable, though not at law absolutely necessary (*Longchamp v. Fish*, 2 B. & P., N. R. 415), that the will should be read over to him in the presence of witnesses, or that there should be proof that the testator was otherwise acquainted with the contents (*Fincham v. Edwards*, 3 Cur. 63; 4 Moo. P. C. 198; 7 Jur. 25). The Ecclesiastical Courts were more strict on this head than the Courts of Law, and required that the will of a blind testator should be read over to him in the presence of a witness, although not necessarily in the presence of a subscribing witness (Sugd. R. P. Stat. 335); and by the 71st rule of 1862, the registrars of the Probate Court are forbidden to grant probate of the will of a blind or illiterate person unless satisfied that it was read over to him before execution, or that he then had knowledge of its contents. See also *Re Axford* (1 Sw. & Tr. 540; 36 L. T. 86). As to the will of an aged testator, see *Goose v. Brown* (1 Cur. 707); and as to a deaf and dumb testator, *Re Owston* (2 Sw. & Tr. 461; 10 W. R. 410); *Re Geale* (3 Sw. & Tr. 431).

Aged or deaf and dumb testator.

Time of signing by testator.

The signature of the testator must precede that of both the witnesses; if the testator signs after the witnesses, or either of them, the execution is invalid (*Re Olding*, 2 Cur. 865; *Re Byrd*, 3 Cur. 117; *Re Hoskins*, 1 N. R. 569; see also *Cooper v. Bockett*, 3 Cur. 648; 4 Moo. P. C. 419; 10 Jur. 930). The testator's signature upon the will must be seen by the witnesses (*Hudson v. Parker*, 1 Rob. 25; *Shaw v. Neville*, 1 Jur., N. S. 408), or at all events they should see the testator in the act of writing that which the Court presumes to be his signature (*Smith v. Smith*, L. R., 1 Prob. 143); but the witnesses need not know that the document is of a testamentary character (*Gaze v. Gaze*, 3 Cur. 451; 7 Jur. 803; *Keigwin v. Keigwin*, 3 Cur. 607; 7 Jur. 840; Sugd. R. P. Stat. 339, 340). The witnesses, however, ought to see that there is writing on the paper before the testator's signature is affixed or acknowledged, or other evidence must be produced to show that the paper was not a blank (*Re Hammond*, 3 Sw. & Tr. 90; 11 W. R. 639; and see *Byrne v. Hogan*, 6 Ir. Jur., N. S. 114).

Witnesses must see the signature of testator.

Testator's signature. By making his mark.

The mark of the testator (whether he can or cannot write) is a sufficient signature (*Re Field*, 3 Cur. 752; *Baker v. Dening*, 8 A. & E. 94), even though his name is not affixed to the mark (*Re Bryce*, 2 Cur. 325); a facsimile of testator's signature impressed on the will by means of an engraved

in his presence and by his direction (*o*); and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time (*p*); and

stamp is sufficient (*Jenkins v. Gaisford*, 3 Sw. & Tr. 93; 2 N. R. 401); and where a wrong name is added by one of the witnesses to the testator's mark, the execution, if there is no doubt as to the identity, is good (*Re Clarke*, 1 Sw. & Tr. 23; 6 W. R. 307; *Re Douce*, 2 Sw. & Tr. 593; 6 L. T., N. S. 789; see also *Re Powell*, 6 No. Cas. 557).

The signature to her will by a married woman in the name of her deceased first husband is good (*Re Glover*, 5 No. Cas. 553; 11 Jur. 1022); and the signature in an assumed name is good (*Re Redding*, otherwise *Higgins*, 2 Rob. 339; 14 Jur. 1052); and where the testatrix, after signing in an assumed name, erased that name, and inserted her real name without any formal re-execution of her will, the original execution was held good (*ib.*). The signature of a testator by writing his initials is good (*Re Wingrove*, 15 Jur. 91; *Re Savory*, *ib.* 1042; *Re Hinds*, 16 Jur. 1161). The hand of the testator, if he is unable from illness to sign, may be guided (*Wilson v. Beddard*, 12 Sim. 28). But the ceremony of execution must be complete whilst the testator is living; for where an intended testator tries to sign his will, but fails from weakness, the Court has no power to decree probate (*Re Wilson*, 2 Cur. 854).

Wrong name.

By initials.

The sealing (without signing) of a will by the testator is not a due execution (*Re Summers*, 7 No. Cas. 562; *Smith v. Evans*, 1 Wils. 313; *Wright v. Wakeford*, 17 Ves. 459; *Baker v. Dening*, 8 A. & E. 94; 2 Hayes, Conv. 642).

Sealing.

The declaration by a testator (an Indian officer), in a letter to his brother in England, to the effect that the testator had executed a will of which he enclosed a copy in the letter was held inadmissible, and probate of the copy was not granted (*Re Ripley*, 1 Sw. & Tr. 68). See also sect. 21, n.

Ex post facto declarations of testator inadmissible.

(*o*) The will shall be signed "by the testator, or by some other person in his presence and by his direction." The "other person" here referred to may be one of the witnesses (*Re Bailey*, 1 Cur. 914; *Smith v. Harris*, 1 Rob. 262; 9 Jur. 406); and where a witness (*Re Ullersperger*, 6 Jur. 156), or the other person above referred to (*Re Clark*, 2 Cur. 329; *Re Blair*, 6 No. Cas. 528), signed the name of the witness instead of that of the testator, the signature was held good.

Testator, signature of, by an amanuensis.

(*p*) Both the witnesses must be present together when the will is signed by, or by the direction of, the testator, or when the signature is acknowledged by him (*Re Mansfield*, 1 No. Cas. 364; and see *Re Ayling*, 1 Cur. 913). And the two witnesses must both sign in the presence of the testator, but it is not necessary that the witnesses should sign in the presence of each other (*Faulds v. Jackson*, 6 No. Cas. Supp. 1; *Chadwick v. Palmer*, cited D. & Sw. 2; *Re Webb*, D. & Sw. 1; 1 Jur., N. S. 1096; 4 W. R. 92; *Re Allen*, 2 Cur. 331; *Re Simmonds*, 3 Cur. 79; but see *Casement v.*

Witnesses, presence of, with respect to each other and the testator.

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Fulton, 5 Moo. P. C. 130; *Slack v. Busteed*, 6 Ir. Ch. Rep. 1; Sugd. R. P. Stat. 342).

Testator, presence of, with respect to the witnesses on their signing.

The testator must be proved to have been in such a position that he might, if he had wished, have seen the witnesses as they subscribed (*Casson v. Dade*, 1 Br. C. 99; *Re Newman*, 1 Cur. 914; *Re Colman*, 3 Cur. 118; *Re Piercy*, 1 Rob. 278; *Norton v. Bazett*, D. & Sw. 259; 4 W. R. 830). Therefore, during the ceremony of the execution and attestation of a will, the testator should not turn his back upon the witnesses, or be shut out from their view by a curtain, or a screen, or in any other mode (*Tribe v. Tribe*, 1 Rob. 775; 13 Jur. 793; *Sed qu.*: see Sugd. R. P. Stat. 343; and see *Newton v. Clarke*, 2 Cur. 320, in which case, under circumstances similar to those in *Tribe v. Tribe*, the execution was supported). And the witnesses should not go into an adjoining room (*Re Newman*, 1 Cur. 914; *Re Ellis*, 2 Cur. 395; *Re Colman*, 3 Cur. 118; *Norton v. Bazett*, *ubi sup.*; *Re Killick*, 3 Sw. & T. 578), for the greater convenience of fixing their signatures.

Blind testator.

And in the case of a blind testator, the witnesses must, when they are in the act of signing their names, be in such a position that the testator, if he were not blind, could see them affixing their signatures (*Re Piercy*, 1 Rob. 278).

Presumption of law, when in favour of a due acknowledgment. Acknowledgment may be assumed from attendant circumstances.

It will be seen that it is the testator's signature, not his will, that is required to be acknowledged. Where the will is perfect on the face of it, the presumption is in favour of a due acknowledgment—*omnia præsumuntur solenniter esse acta* (*Lloyd v. Roberts*, 12 Moo. P. C. 158). The acknowledgment by express words is not necessary. The acknowledgment by the testator, that the document produced bears his signature, or a signature made by his direction, may be assumed from the attendant circumstances (*Gaze v. Gaze*, 3 Cur. 451; 7 Jur. 803; *Blake v. Knight*, 3 Cur. 547; 7 Jur. 633; *Keigwin v. Keigwin*, 3 Cur. 607; 7 Jur. 840; *Re Ashmore*, 3 Cur. 756; *Re Thompson*, 4 No. Cas. 643; *Re Dinmore*, 2 Rob. 641).

By gesture, good.

Where a testatrix was extremely ill, her acknowledgment by gesture was held sufficient (*Re Davies*, 2 Rob. 337); and an acknowledgment will be assumed from the acts of the testator at the time of the attestation (*Re Jenner*, 6 Jur. 564; *Re Bosanquet*, 2 Rob. 577; *Re Philpot*, 3 No. Cas. 2; *Re Jones*, D. & Sw. 3).

A simple request by a testator, that the witnesses would put their names underneath his own, is sufficient (*Gaze v. Gaze*; *Keigwin v. Keigwin*, *ubi sup.*). Where two witnesses, one of whom had the will in his hand, came into the testatrix's bed-room, and said, "We have come at your request to witness your will," and the testatrix said, "I am glad of it, thank God!" and the witnesses thereupon signed the will, which had been previously signed by the testatrix, this was held a sufficient acknowledgment (*Re Warden*, 2 Cur. 334). And an acknowledgment will be presumed from the attendant circumstances, whether the signature be made by the testator himself, or by some other person in his presence, by his direction (*Re Regan*, 1 Cur. 909). But an acknowledgment will not be presumed from the

such witnesses shall attest (*q*) and shall subscribe the will in

testator's sealing and delivering the will as his act and deed, the will having been signed by another person on behalf of the testator (*Re Summers*, 7 No. Cas. 563). And in the cases where the acknowledgment by the testator is presumed from attendant circumstances, it is necessary that the witnesses, before they sign, should actually see that the document bears the testator's signature (*Ilott v. Genge*, 3 Cur. 160; 4 Moo. P. C. 271; 8 Jur. 323; *Hudson v. Parker*, 1 Rob. 14; 8 Jur. 786; *Shaw v. Neville*, 1 Jur., N. S. 408).

Sealing, an insufficient acknowledgment.

Positive affirmative evidence by the subscribing witnesses to the fact of the signing or acknowledgment of the will by the testator in their presence is not absolutely essential, and the Court may, in the absence of suspicious circumstances, presume a due execution (*Blake v. Knight*, 3 Cur. 547; 7 Jur. 633; *Hitch v. Wells*, 10 Be. 84; *Gwillim v. Gwillim*, 3 Sw. & Tr. 200; *Re Huckvale*, L. R., 1 Prob. 375); and it is favourable to this presumption if the witnesses, or either of them (*Plenty v. West*, 9 Jur. 458), or the testator (*Lloyd v. Roberts*, 12 Moo. P. C. 158), have had experience in the execution of legal documents.

As to evidence of acknowledgment of testator's signature.

In the following cases it was held that there was no sufficient acknowledgment: *Re Allen* (2 Cur. 331); *Re Ashton* (5 No. Cas. 548); *Re Clifford* (16 L. T. 266); *Re Harrison* (2 Cur. 863; 5 Jur. 1017); *Re Rawlings* (2 Cur. 326); *Re Simmonds* (3 Cur. 79); *Re Trinder* (3 No. Cas. 275). See Sugd. R. P. Stat. 339.

Insufficient acknowledgment by testator.

(*q*) As to the meaning of "attest," see *Doe v. Burdett* (6 M. & Gr. 386; 10 C. & F. 340); *Warren v. Postlethwaite* (2 Coll. 113, n.); and of "subscribe," according to the Statute of Frauds, *Roberts v. Phillips* (4 E. & B. 450; 1 Jur., N. S. 444); Sugd. Pow. 229, 240, 241.

"Attest" and "subscribe."

It has been contended that the "presence" of the witnesses required by this section is a presence simply and grossly corporeal (see H. Sugd. Wills, 37; Sugd. R. P. Stat. 340), so that a person of unsound mind might be a witness to a will. It seems, however, to be the better opinion that not only a bodily but a *mental* presence is required (see 1 Hayes, Conv. 360, 363, 371; Taylor, Evidence, 920; *Hudson v. Parker*, 1 Rob. 24). But even if it be conceded that mental consciousness is not included in the idea of "presence," and that it is not necessary to enable the person duly to "subscribe," still the witness is required to do something more—he must "attest" the will; and this would seem to imply, not only general sanity and mental consciousness, but particular consciousness of, and attention to, the actual ceremonies of execution.

"Presence" of witness, what is.

If the subscribing witnesses to a will, of which the attestation clause is in the proper form, are both dead, the law presumes the will to have been well executed; if the witnesses (*Burgoyne v. Showler*, 1 Rob. 10), or either of them (*Blake v. Knight*, 3 Cur. 547; 7 Jur. 633; *Leech v. Bates*, 1 Rob. 723; *Shield v. Shield*, 4 No. Cas. 647), be living and utterly forgetful of all the facts (*Foot v. Stanton*, D. & Sw. 19; *Re Holgate*, 1 Sw. & Tr.

Full attestation clause—and witnesses dead;

or forgetful of the facts;

Sect. 9.

or will not swear to them.

Imperfect attestation clause—and witnesses cannot be found; or forget the facts.

Witnesses out of the jurisdiction.

Evidence of witnesses inaccurate and imperfect.

Evidence negating compliance with provisions of s. 9;—may be rebutted.

Evidence of one witness.

Evidence conflicting.

261; *Gwillim v. Gwillim*, 3 Sw. & Tr. 200; 29 L. J., Prob. 31), or will not swear to them (*Thompson v. Hall*, 1 Rob. 426; 16 Jur. 1144), the presumption of law is in favour of the due execution of the will. Where a will has an imperfect attestation clause, and the witnesses cannot be found (*Re Luffman*, 11 Jur. 211; *Re Sir J. Dickson*, 6 No. Cas. 278), or the witnesses do not remember some of the facts (*Re Leach*, 12 Jur. 381; *Divett v. Ware*, 30 L. T. 175; see also *Re Thomas*, 1 Sw. & Tr. 255; 7 W. R. 270), or differ in their evidence, or their recollection fails (*Gregory v. Queen's Proctor*, 4 No. Cas. 620; *Vinnicombe v. Butler*, 3 Sw. & Tr. 580), the will, if all the attendant circumstances lead to the inference that the signatures of the witnesses are genuine, will be held to be duly executed. Where two witnesses to a will executed abroad were out of the jurisdiction, and the third witness dead, the Court of Exchequer decided that proof of the handwriting of the testator and witnesses was sufficient proof of the attestation of the will (*Platel v. Stert*, 2 L. T. 210): and when the inaccuracy and imperfect recollection of the witnesses are established, the Court may, upon the circumstances of the case, presume the due execution (*Leech v. Bates*, 1 Rob. 715). So where one witness deposed to the due execution of the will, and the other witness had no recollection of the facts, probate was allowed (*Shield v. Shield*, 4 No. Cas. 647; *Re Hare*, 3 Cur. 54). But if the subscribing witnesses negative the fact of compliance with the requisites of the 9th section, probate will be refused (*Beach v. Clarke*, 7 No. Cas. 120; *Croft v. Croft*, 4 Sw. & Tr. 10), unless the evidence of the witnesses be rebutted by showing either that they cannot be credited or that upon the statement of the facts their memories are defective (*Burgoyne v. Showler*, 1 Rob. 5), or that there were circumstances raising a presumption that the witnesses were mistaken (*Noding v. Alliston*, 14 Jur. 904; *Divett v. Ware*, 30 L. T. 175; *Lloyd v. Roberts*, 12 Moo. P. C. 158). And where one witness was dead and the other swore that the paper was blank at the time of execution, the will, being perfect on the face of it, and the testator being a solicitor, was upheld by the Court, although the testator's wife and children (who, however, had for many years lived apart from him) were excluded from all benefit (*Lloyd v. Roberts*, 12 Moo. P. C. 158). The execution of a will may be supported on the evidence of one witness, that of the other having been discredited (*Farmer v. Brock*, D. & Sw. 187). And the testimony of one subscribing witness was held sufficient, though the other deposed that the testator had not signed in his presence (*Gove v. Gaven*, 3 Cur. 151). In that case the attendant circumstances favoured the supposition of a valid execution, there being a formal attestation clause, and the first witness having deposed to the due execution of the will a few days after it was made, while the second was not examined till two years and a half afterwards. But in *Mackenzie v. Yeo* (3 Cur. 125), the evidence of one witness was held insufficient to support a codicil, the attendant circumstances being suspicious. And where one witness deposed that the will was executed by the testator after the witnesses had signed, and the other

the presence of the testator (*r*), but no form of attestation shall be necessary (*s*).

witness deposed that the will was not executed in the presence of the two witnesses, and the attestation clause was imperfect, probate was refused (*Pennant v. Kingscote*, 3 Cur. 642; 7 Jur. 754). See also *Young v. Richards* (2 Cur. 373); *Chambers v. Queen's Proctor* (2 Cur. 433). And where the evidence of the witnesses is not clear the will may be supported by the testimony of a third person, who, though not a subscribing witness, was present during the ceremony of execution (*Bayliss v. Sayer*, 3 No. Cas. 22; *Bennett v. Sharp*, 1 Jur., N. S. 456). See also *Re Attridge* (6 No. Cas. 598; 13 Jur. 88).

Evidence not clear.

If the testator has had much experience in the execution of wills, this is an attendant circumstance favourable to the presumption of due execution (*Lloyd v. Roberts*, 12 Moo. P. C. 158; *Brenchley v. Still*, 2 Rob. 162; *Blake v. Knight*, 3 Cur. 562). The evidence of illiterate witnesses to a will, as to the details of the ceremony, is received with caution (*Cooper v. Bockett*, 3 Cur. 648, 4 Moo. P. C. 419, 10 Jur. 930); but if the attendant circumstances are free from suspicion, a will will not be set aside though the testimony of the witnesses is confused or indefinite (*Bayliss v. Sayer*, 3 No. Cas. 22; *Brenchley v. Still*, 2 Rob. 162. See also *Re Ayling*, 1 Cur. 913; *Gove v. Gaven*, 3 Cur. 151; *Keating v. Brooks*, 4 No. Cas. 253; *Re Mustov*, 4 No. Cas. 289; *Beach v. Clarke*, 7 No. Cas. 120; *Thomson v. Hall*, 16 Jur. 1144).

Experience in attesting wills.

Illiterate witnesses.

Evidence confused and indefinite.

(*r*) In the attesting of a will, the mark of a witness is sufficient (*Re Ashmore*, 3 Cur. 756); and this is true, even if the witness can write (*Re Amiss*, 2 Rob. 116, 7 No. Cas. 274), and although a wrong surname was affixed by the testator to the mark of a witness, his attestation was held good (*Re Ashmore, ubi sup.*). Where a witness, intending to write his own name, writes a wrong one by mistake, or writes words sufficient and intended to identify himself as the person attesting, the attestation is good (*Re Olliver*, 2 Ecc. & Ad. Rep. 57; *Re Sperling*, 3 Sw. & Tr. 272); but where, by desire of the testator, a woman signed her husband's name, not intending thereby to represent her own signature, the attestation was held bad (*Pryor v. Pryor*, 29 L. J., N. S., Prob. 114). The signature of a witness by his initials is a good attestation (*Re Christian*, 2 Rob. 110; *Re Martin*, 6 No. Cas. 694; *Re Hinds*, 16 Jur. 1161); but his seal is not (*Re Byrd*, 3 Cur. 117). The hand of a witness who cannot write may be guided (*Harrison v. Elvin*, 3 Q. B. 117; *Re Frith*, 1 Sw. & Tr. 8; 6 W. R. 262; *Lewis v. Lewis*, 2 Sw. & Tr. 153; 7 Jur., N. S. 688); but if the witness *can* write, and his hand be guided, it would seem that the attestation is bad (*Re Kilcher*, 6 No. Cas. 15, 12 Jur. 163), but that case does not amount to a decision (Sugd. R. P. Stat. 341, n. (g)). If a witness cannot write, and his name be written for him, he making no mark to be afterwards recognized upon the will, the attestation is bad (*Re Mead*, 1 No. Cas. 456; 6 Jur. 351; *Re Cope*, 2 Rob. 335). And the same is true

Witnesses. Mark, good.

Wrong name.

Initials, good.

Seal, bad.

Witness's hand may be guided.

Name of a witness written for him, he making no mark.

Sect. 9.

where the witnesses are husband and wife, and the husband signs for the wife (*Re White*, 2 No. Cas. 461, 7 Jur. 1045).

Position of witnesses' signature.

A paper is not entitled to probate unless the Court is satisfied that the names of the alleged witnesses were subscribed for the purpose of attesting the testator's signature (*Re Wilson*, L. R., 1 Prob. 269).

If the witnesses are dead, it will not be presumed that they did not both sign at the same time from a difference in the colour of the ink (*Trott v. Skidmore*, 2 Sw. & Tr. 12).

Witness's acknowledgment of prior signature, bad.

The acknowledgment of a prior signature, though good if made by a testator, is bad in the case of a witness; thus the acknowledgment by a witness of his signature made on the occasion of a previous informal execution of the will, and the signature at the same time in his presence by a second witness, form together an insufficient attestation (*Moore v. King*, 3 Cur. 243, 7 Jur. 205); the result being in fact that the will was executed in the presence of one witness only, the signature of the other having been affixed *prior* to the valid execution of the testator by the acknowledgment of his signature (see *Re Olding*, *Re Byrd*, *Cooper v. Bockett*, *ante*, p. 14; see also *Re Allen*, 2 Cur. 331). And if, on the re-execution of a will, a witness with a dry pen traces over his previous signature, this, though good in the case of a testator, is as to a witness, a mere acknowledgment, and the attestation is bad (*Playne v. Scriven*, 1 Rob. 772; 13 Jur. 712; *Re Trevanion*, 2 Rob. 311; 14 Jur. 919; *Re Simmonds*, 3 Cur. 79), the Act requiring something to be done by the witness which shall be apparent on the face of the will. The addition on the re-execution of a will of the word "Bristol," the place of residence of one of the witnesses who was a witness to both executions, is not a good attestation of the second execution (*Re Trevanion, ubi sup.*) But see *Re Christian* (2 Rob. 110, 312, n.). To make a valid subscription and attestation, there must be either the name of the witness or some mark intended to represent it; the correction of an error in a previous writing of the name, or the addition of a date to it, is not sufficient; thus where, under circumstances similar to those in *Re Trevanion*, a witness, one of whose christian names was "Frederick," put a cross to the letter "F" of his first signature, the second attestation was held bad (*Charlton v. Hindmarsh*, 8 H. L. C. 160; 1 Sw. & Tr. 433; 7 W. R. 725; 9 W. R. 521). A valid execution is not destroyed by subsequent mistakes (*Re Savory*, 15 Jur. 1042); as by alterations or erasures made in error (*Re Hannan*, 7 No. Cas. 437; 14 Jur. 558; *Re Redding*, 14 Jur. 1052); or by the cutting off of one of the witnesses' names for the purpose of its being re-written (*Re Tozer*, 7 Jur. 134). See also *Re Coleman* (2 Sw. & Tr. 314).

Tracing over previous signature, bad.

There must be the name of witness, or a mark intended to represent it.

Evidence of the execution of a will.

The execution of a will may be proved in the Probate Court on the evidence of one only of the attesting witnesses. By the practice of the Prerogative Court, the evidence of both the witnesses to a will was necessary. But the question as to evidence is now governed by 20 & 21 Vict. c. 77, s. 33, which enacts that the rules of evidence observed in the common law courts are to be observed in the Court of Probate (*Belbin v. Skeats*, 1 Sw. & Tr. 148). With respect to wills, however, it is the invariable practice of

An Act for the Amendment of an Act passed in the First Year of the Reign of Her Majesty Queen Victoria, intituled "An Act for the Amendment of the Laws with respect to Wills." [17th June, 1852.] 15 & 16 VICT.
c. 24.

WHEREAS the laws with respect to the execution of wills require further amendment: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal and Commons in this present Parliament assembled, and by the authority of the same, as follows:—

1. Where, by an Act passed in the first year of the reign of

equity courts to require the examination of all the witnesses who can be called (2 Taylor, Evidence, 1578); and this rule applies likewise to issues directed by equity courts to be tried by jury (*ib.*).

(s) "*No form of attestation shall be necessary.*"

Attestation,
form of.

This applies to wills in execution of powers (Sugd. Pow. 243), as well as to other testamentary instruments.

The mere subscription of the witnesses, without a word in addition to their names, is sufficient (*Bryan v. White*, 2 Rob. 315; *Re Thomas*, 1 Sw. & Tr. 255; 7 W. R. 270). See Sugd. R. P. Stat. 333; 2 Hayes, Conv. 642. A full attestation clause, though not absolutely necessary, is useful and desirable for the purposes of probate; for, if the formalities of execution are not stated to have been complied with, they must be proved, if proof can be obtained, and if not, the absence of proof accounted for (*Re Diaper*, 3 N. R. 215). The presumption of due execution arising from a formal attestation clause may be negated by evidence of the actual circumstances of the execution (*Croft v. Croft*, 4 Sw. & Tr. 10). If another person than the testator signs for him, that fact should, to save trouble in obtaining probate, be mentioned in the attestation (*Re Cooper*, 5 No. Cas. 618). The position of the attestation clause, should there be one, appears to be unimportant (*Re Davis*, 3 Cur. 748; *Re Chamney*, 1 Rob. 757; 7 No. Cas. 70); in the latter case, an attestation clause on the fourth side of a sheet of paper folded bookwise, the whole will and the testator's signature being on the first side, was held good. See also *Roberts v. Phillips* (4 E. & B. 450; 1 Jur., N. S. 444). But in *Re Taylor* (2 Rob. 411), where there were two testamentary dispositions on the same sheet of paper, signed by the testatrix at the same time, and the witnesses subscribed their names only to the first in order, it was held that they attested the first only, and probate of the second was refused. And if a will be on several sheets, all of which are signed by the testator and witnesses except the last, which is signed by the testator only, the execution is bad (*Ewen v. Franklin*, D. & Sw. 7); *à fortiori*, where the last sheet is signed by the witnesses only (*Sweetland v. Sweetland*, 4 Sw. & Tr. 6).

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When signature to a will shall be deemed valid.

her Majesty Queen Victoria, intituled "*An Act for the Amendment of the Laws with respect to Wills*," it is enacted, that no will shall be valid unless it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; every will shall, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid within the said enactment, as explained by this Act, if the signature shall be so placed at or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will (*t*), and that no such will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature (*u*), or by the circumstance that the signature shall be placed among the words of the testimonium clause or of the clause of attestation (*x*), or shall follow or be after or under the

Cases on the
Wills Act
Amendment
Act, 1852.

(*t*) See *Re Gausden*, 2 Sw. & Tr. 362; *Trott v. Skidmore*, 2 Sw. & Tr. 12; 8 W. R. 590; *Cook v. Lambert*, 3 Sw. & Tr. 46; 9 Jur., N. S. 258, in which case probate was decreed where the mark of the testator and the signatures of the witnesses were on a separate piece of paper, attached by wafers to that on which the body of the will was written. See also *Re Jones*, 4 Sw. & Tr. 1; *Re Wright*, *ib.* 35; *Re Williams*, L. R., 1 Prob. 4; *Re Coombs*, *ib.* 302. In *Sweetland v. Sweetland* (4 Sw. & Tr. 6), the testator and witnesses signed each of five sheets; on the sixth were the testimonium and attestation, and the signatures of the witnesses, but not of the testator; although the dispositive part of the will was complete in the five sheets, the Court could not admit those sheets to probate; there was no signature at the foot or end of the will.

(*u*) See *Re Howell* (1 Rob. 671); *Re Beadon* (2 Rob. 139).

Signature in
testimonium
or attestation
clause.

(*x*) Decisions to this effect were given before the passing of this Act in *Re Gunning* (1 Rob. 459), where the testator's signature was in the testimonium clause; and in *Re Woodington* (2 Cur. 324), where the signature was in, and formed part of, the attestation clause. See also *Re Chaplyn* (10 Jur. 210); *Re Dinmore* (2 Rob. 641). Questions may still arise upon the Act, 15 & 16 Vict. c. 24, as to whether the signature of the testator in the testimonium or attestation clause was intended for the testator's signature to the will (1 Wms. Exors. 76, n. (*b*)); for example, where the whole of either of these clauses is in the handwriting of the testator. But in *Re Mann* (28 L. J., Prob. 19), a case upon the Act 15 & 16 Vict. c. 24,

clause of attestation, either with or without a blank space intervening (*y*), or shall follow or be after or under or beside the names or one of the names of the subscribing witnesses (*z*), or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will whereon no clause or paragraph or disposing part of the will shall be written above the signature (*a*), or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature (*b*); and the enumeration of the above circumstances shall not restrict the generality of the above enactment; but no signature under the said Act or this Act shall be operative to give effect to any disposition or direction which is underneath (*c*) or

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c. 24.

the signature of the testator in the testimonium clause (the whole of which clause was in his own handwriting) was held, after some hesitation, to be good. And where the testator read over an attestation clause containing his name, written by himself, in the presence of two witnesses, who subscribed, it was, under the circumstances proved, held that the testator intended to give effect to the will by the signature in the attestation clause, and probate was granted (*Re Walker*, 2 Sw. & Tr. 354). See also *Re Torre* (8 Jur., N. S. 494); *Smith v. Smith* (L. R., 1 Prob. 143).

The Wills
Act Amend-
ment Act,
1852.

(*y*) See *Re Whittle* (2 Rob. 122); *Hunt v. Hunt* (L. R., 1 Prob. 209).

(*z*) See *Re Smith* (7 No. Cas. 376).

(*a*) See *Willis v. Lowe* (11 Jur. 807); *Smee v. Bryer* (6 Moo. P. C. 404; 13 Jur. 289); *Re Shadwell* (7 No. Cas. 377).

(*b*) A will was written on, and entirely filled, six pages of letter paper, there being no room for an attestation clause on the sixth page. The testatrix signed each of the six pages, and her signature and the attestation clause were on the top of the seventh page. This last signature was the only one made in the presence of, or seen by, the attesting witnesses. It was held that, under the Amendment Act, the will was entitled to probate (*Re Brown*, 16 Jur. 602).

(*c*) Words were, before the execution of the will, written on the left of, and a little lower than, the place of the testator's signature. These words were not admitted to probate, although the Court was of opinion, that strictly speaking, they were neither "*underneath*," nor did they "*follow*," the testator's signature (*Re Greata*, D. & Sw. 266, 5 W. R. 42; see also *Re Topham*, 14 Jur. 47; *Re Peach*, 1 Sw. & Tr. 138, 6 W. R. 865; *Re Kimpton*, 3 Sw. & Tr. 427; *Re Woodley*, *ib.* 429). But in the case of the will of an Englishwoman made in France, a notarial minute of the execution of the will was written on the same sheet as and immediately

15 & 16 Vict.
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which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made.

Act to extend
to certain
wills already
made.

2. The provisions of this Act shall extend and be applied to every will already made, where administration or probate has not already been granted or ordered by a Court of competent jurisdiction in consequence of the defective execution of such will, or where the property, not being within the jurisdiction of the Ecclesiastical Courts, has not been possessed or enjoyed by some person or persons claiming to be entitled thereto in consequence of the defective execution of such will, or the right thereto shall not have been decided to be in some other person or persons than the persons claiming under the will, by a Court of competent jurisdiction, in consequence of the defective execution of such will (*d*).

Interpreta-
tion of
"will."

3. The word "will" shall in the construction of this Act be interpreted in like manner as the same is directed to be interpreted under the provisions in this behalf contained in the said Act of the first year of the reign of her Majesty Queen Victoria.

Short title of
Act.

4. This Act may be cited as "The Wills Act Amendment Act, 1852."

1 Vict. c. 26,
s. 10.

Appoint-
ments by will
to be ex-

EXECUTION OF TESTAMENTARY APPOINTMENTS.

X. And be it further enacted, That no appointment (*e*) made by will, in exercise of any power, shall be valid, unless the

following the will; the testatrix and the witnesses signed their names at the foot of this minute; the Court held the execution valid (*Page v. Donovan*, D. & Sw. 278, 5 W. R. 324).

See also *Re Willmott* (1 Sw. & Tr. 36); *Re Catrall* (3 Sw. & Tr. 419); *Re Powell* (4 Sw. & Tr. 34); *Re Dallow* (L. R., 1 Prob. 189).

(*d*) By this section, every will which had not, prior to the 17th June, 1852, been pronounced to be defectively executed, is brought within the operation of the amending Act (16 Jur. 602, n.).

Powers.
Appointment
by writing
under hand
and seal, the
will must be
sealed.

(*e*) A power to appoint by writing under the hand and seal of the donee, is not well exercised by the will of the donee executed and attested according to the provisions of the 9th sect., but unsealed (*West v. Ray*, Kay 385; *Collard v. Sampson*, 4 D. M. & G. 224; *Taylor v. Meads*, 5 N. R.

same be executed in manner hereinbefore required; and every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been (f) expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity.

Sect. 10.
ecuted like
other wills,
and to be
valid, al-
though other
required so-
lemnities are
not observed.

WILLS OF SOLDIERS AND SEAMEN.

XI. Provided always, and be it further enacted, That any (g)

Soldiers and
mariners'
wills ex-
cepted.

348; 34 L. J., Ch. 203). See Sugd. Pow. 217; 4 Dav. Conv. by Waley, 28.

That a will is a "writing," within the meaning of a power to appoint "by writing," see *Lisle v. Lisle* (1 Br. C. 533; and compare Kay, 392; Sugd. R. P. Stat. 332). It is submitted therefore that a power to appoint "by writing under hand and seal" would be well exercised by a will duly signed, attested and sealed; and that a power to appoint "by will under hand and seal," or "by writing, testamentary or otherwise, under hand and seal," would fall within this section of the Wills Act, and be well exercised by will, duly signed and attested, without the addition of a seal.

Will under
seal; effect
of, in ex-
ercising a
power.

But the Act is confined to the mode of execution and attestation; and in regard therefore to all other matters, though relating to the quality or perfection of the instrument, as enrolment, registration, engrossment on parchment, indentation or any similar requisite, however whimsical (for of such requisites whimsicality is the essence, *Hawkins v. Kemp*, 3 Ea. 410), the terms of the power must be pursued as before; and of course this remark applies *à fortiori* to matters relating to the time or the place of execution (1 Hayes, Conv. 367).

The Act is
confined to
the requisites
of execution
and attesta-
tion.

A power to appoint by writing under hand or by will is not well exercised by a document of a testamentary character signed by the donee, but unattested (*Re Daly's Settlement*, 25 Be. 456).

Unattested
writing, bad.

A power to appoint by will, "signed and published in the presence of and attested by three or more witnesses," was held to be well executed by will made and published and signed in the presence of and attested by three witnesses, although the attestation took no notice of the publication (*Re Wrey's Trust*, 17 Sim. 201).

The 12th sect. of 22 & 23 Vict. c. 35 (as to the mode of execution of powers), does not apply to powers to be executed by will.

22 & 23 Vict.
c. 35, s. 12.

(f) This section relates to powers created since, as well as to powers created before, the Act (*Hubbard v. Lees*, L. R., 1 Exch. 255).

(g) This provision, extending to *any* soldier on service or seaman at sea, overrides the provision of section 7, that no will made by *any* person under twenty-one shall be valid. Thus the informal will of a minor, written

Minor.

Sect. 11.

soldier (*h*) being in actual military service (*i*), or any mariner or seaman (*k*) being at sea (*l*), may dispose of his personal

in pencil on the battle-field of Aliwal, after he was mortally wounded (*Re Farquhar*, 4 No. Cas. 651), was held valid; and in *Re M'Murdo* (L. R., 1 Prob. 540), the testator, a seaman, was under twenty-one when the will was executed.

Soldier.
East India
Company.

(*h*) That the term "soldier" in this section applied to persons in the military service of the late East India Company, see *Re Donaldson* (2 Cur. 386).

Soldier.
Will invalid.

(*i*) The construction of the 11th section of the Act was discussed in *Drummond v. Parish* (3 Cur. 522; 7 Jur. 538). In that case the unattested will of Major-General Drummond, who died at Woolwich whilst holding the office of Director-General of Artillery, and on full pay, was decided not to be within the exception of the 11th section. That decision was followed in the case of an officer in barracks with the regiment at St. John's, New Brunswick, and the probate of his will, informally executed, was refused (*White v. Repton*, 3 Cur. 818, 8 Jur. 562; see also *Re Pery*, 2 L. T. 335); also in the case of an officer in her Majesty's service, who was in command of the Mysore division of the late East India Company's forces, and died in India whilst on a tour of inspection (*Re Hill*, 1 Rob. 276); and in the case of a sergeant with his regiment at Malta, under orders for the West Indies (*Re Norris*, 3 No. Cas. 197). See also *Re Thorne* (4 Sw. & Tr. 86).

Will valid.

But where an officer in India died whilst passing from one regiment to another, both regiments being in active service, his informal will, contained in a letter to his brother, was admitted to probate (*Herbert v. Herbert*, D. & Sw. 12, 4 W. R. 182). And an unsigned memorandum endorsed on a duly executed will, the memorandum having been written soon after the testator had received a mortal wound in battle, was admitted to probate (*Re Churchill*, 4 No. Cas. 47); and so was the will of a gunner in the late East India Company's service, though signed only by a mark, of which, from the witnesses not being produced, there was no evidence of identity (*Re Prendergast*, 5 No. Cas. 92); see also *Re Phipps* (2 Cur. 368). To obtain probate of the unattested will of a soldier, there must be the affidavits of two disinterested persons to prove the handwriting of the deceased (*Re Neville*, 28 L. J., Prob. 52); and in the case of an illiterate soldier's will, there must be proof that the will was read over to the deceased, or that he had a full knowledge of its contents (*Re Hackett*, 28 L. J., Prob. 42).

Sailor.

(*k*) The purser of a man-of-war is a "seaman" within this section (*Re Hayes*, 2 Cur. 338); so is a surgeon in the navy (*Re Saunders*, L. R., 1 Prob. 16). The whole service would seem to be included (1 Wms. Exors. 118).

(*l*) The informal will of Admiral Austen, made by him on board a

estate as he might have done before the making of this Act (*m*).

PETTY OFFICERS, SEAMEN AND MARINES.

XII. And be it further enacted, That this Act shall not prejudice or affect any of the provisions contained in an Act passed in the eleventh year of the reign of his Majesty King George the Fourth and the first year of the reign of his late

[*Repealed.*] Act not to affect certain provisions of 11 Geo. 4 & 1 Will. 4, c. 20, with respect to wills of

Queen's ship in a river (not at sea), whilst engaged on an expedition against an enemy (*Re Austen*, 2 Rob. 613; 17 Jur. 284); the informal will of a seaman in her Majesty's service, who went on shore whilst his vessel was in harbour at Buenos Ayres, and there died by an accident (*Re Lay*, 2 Cur. 375); the informal will of a surgeon in the navy, made on board ship when he was not on duty but returning from service (*Re Saunders*, L. R., 1 Prob. 16); and the will of the mate of a man-of-war permanently stationed in Portsmouth harbour, made whilst serving on board (*Re M'Murdo*, *ib.* 540); have been admitted to probate as wills of "seamen at sea."

Sailor at sea.

But the will of the admiral of the Jamaica naval station was declared not within the saving of the Statute of Frauds, 29 Car. 2, c. 3, s. 23 (*Euston v. Seymour*, cited 2 Cur. 339; 3 Cur. 530); the will having been made in the admiral's house on shore and not "at sea."

An unattested letter, written by a seaman in the merchant service, from his vessel lying in the Margate Roads, containing a disposition of his property, was admitted to probate (*Re Milligan*, 2 Rob. 108; 13 Jur. 1011); so was a letter written by a master of a vessel, from a port at which he had touched in his voyage (*Re Parker*, 2 Sw. & Tr. 375; 5 Jur., N. S. 553); so were entries in pencil of a testamentary character made in the course of a voyage to Valparaiso, by a merchant seaman, in an "abstract book" or log book (*Re Thompson*, 5 No. Cas. 596).

Merchant seamen.

But the letters of a seaman written in port on the day he was shipped, the vessel not sailing until fifteen days after, were not admitted to probate (*Re Corby*, 18 Jur. 634).

(*m*) The will of a soldier made during actual service, and not expressly revoked, remains operative, though the testator lives in England several years after the date of the will (*Re Leese*, 17 Jur. 216); a testamentary privilege apparently more extensive than that allowed under the Roman law (Inst. ii. Tit. xi.; see also Cod. Nap. § 984).

Soldier.

To obtain probate under sect. 11 the motion must be supported by a statement of the facts, to enable the Court to judge whether or not the will is entitled to the privilege or comes within the scope of the section.

It will be observed that this section applies only to personal estate; a will of real estate must in every case be executed in accordance with sect. 9.

Sect. 12.

petty officers
and seamen
and marines.
[Repealed.]

Majesty King William the Fourth, intituled "An Act to amend and consolidate the Laws relating to the Pay of the Royal Navy," respecting the Wills of Petty Officers and Seamen in the Royal Navy, and Non-commissioned Officers of Marines, and Marines, so far as relates to their Wages, Pay, Prize Money, Bounty Money and Allowances, or other Monies payable in respect of Services in her Majesty's Navy (*n*).

PUBLICATION.

Publication
not to be
requisite.

XIII. And be it further enacted, That every will executed in manner hereinbefore required shall be valid without any other publication thereof (*o*).

ATTESTING WITNESSES' COMPETENCY.

Will not be
void on ac-
count of in-
competency
of attesting
witness.

XIV. And be it further enacted, That if any person who shall attest the execution of a will, shall at the time of the execution thereof, or at any time afterwards, be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid.

GIFTS TO ATTESTING WITNESSES.

Gifts to an
attesting
witness to be
void.

XV. And be it further enacted, That if any person shall attest the execution of any will to whom or to whose wife or

Seamen's
wills.

(*n*) This section (together with the provisions of 11 Geo. 4 & 1 Will. 4, c. 20, which were thereby saved), has been repealed by "The Admiralty &c. Acts Repeal Act, 1865" (28 & 29 Vict. c. 112). And better provision respecting wills of Seamen and Marines of the Royal Navy and Marines has been made by "The Navy and Marines (Wills) Act, 1865" (28 & 29 Vict. c. 72). See Appendix.

Publication.

(*o*) It is not necessary for the testator to inform the witnesses of the testamentary nature of the document which they are about to sign; and if he deceives the witnesses on this point, and leads them to believe that such document is a deed, the execution will be good (Sugd. R. P. Stat. 339, 340; H. Sugd. Wils. 140; 1 Hayes, Conv. 365). See also *ante*, p. 14.

The following are recent cases upon the publication of wills under the old law: *Bartholomew v. Harris* (15 Sim. 78); *Vincent v. Bishop of Sodor and Man* (4 De G. & S. 294); *Barnes v. Vincent* (9 Jur. 260); *Re Wrey's Trust* (17 Sim. 201); and *Warren v. Postlethwaite* (2 Col. 111); in the note to the last-named case, numerous authorities are collected. See also Sugd. Pow. 243.

husband any beneficial (*p*) devise, legacy, estate, interest, gift, or appointment of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as

(*p*) This section altered the law with respect to the admissibility of witnesses, in two ways; first, by destroying the distinction between real and personal estate; for, as a will of personalty did not require any witness, a gift to an attesting witness of such a will was not void under 25 Geo. 2, c. 6 (*Emanuel v. Constable*, 3 Rus. 436); and secondly, by extending the provisions of 25 Geo. 2, c. 6, to the wives and husbands of attesting witnesses; such wives and husbands were not within that statute, and were, consequently, not admissible witnesses (*Hatfield v. Thorp*, 5 B. & Al. 589).

As to witnesses.

Where a will was attested by two marksmen, and signed also by two other persons as witnesses, a gift to the wife of one of the signing witnesses failed (*Wigan v. Rowland*, 11 Ha. 157). A will was written on three sides of a sheet of paper; the testator W. R. and two persons J. T. G. and J. S. H. signed the first and second sides; at the bottom of the third side was written "Witness my hand and seal, W. R. (Seal), Witness, J. T. G., J. S. H." On the fourth side was the following memorandum, "This will and testament was signed in our presence, and in the presence of each other by him. Witness thereto, J. T. G., J. S. H., G. B." G. B. was one of several devisees under a gift over, which in the event took effect; it was held that G. B. was precluded from taking any interest under the will (*Randfield v. Randfield*, 2 N. R. 309; 11 W. R. 847; see however 8 H. L. C. 228, n.) See also *Re Toker*, 4 L. T., N. S. 183; *Re Harlin*, *ib.* 839. A legacy, annuity or residue bequeathed by will to A. is not affected by the attestation by A. of a codicil to the will, and this is true, even though the codicil by revoking legacies given by the will, indirectly increases the amount of the residue (*Gurney v. Gurney*, 3 Drew. 208; *Tempest v. Tempest*, 2 K. & J. 635; see also *Stocks v. Hammond*, 2 N. R. 307; *Gaskin v. Rogers*, L. R., 2 Eq. 284). And it would seem to be clear that the subsequent marriage of a witness to a person entitled to the benefit of a devise or bequest in the will, would not render null and void that devise or bequest.

Gifts to witnesses.

As to attesting a codicil.

Subsequent marriage of witness to devisee or legatee.

Where there is a gift to several as joint tenants, one of whom is an attesting witness, and thereby forfeits his interest, the statute does not create a severance of the joint tenancy, but the whole gift goes to the others (*Young v. Davies*, 2 Dr. & S. 167).

A devise or bequest to a witness, to be null and void, must be beneficial, so that in the case of a gift of property upon trust, the gift is not void (*Re Ryder*, 2 No. Cas. 462; *Cresswell v. Cresswell*, L. R., 6 Eq. 69).

Devise of property in trust.

See also *Re Mitchell*, 2 Cur. 916; *Re Forest*, 2 Sw. & Tr. 334; and see sect. 17.

Sect. 15.

concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will (*q*).

CREDITOR ATTESTING WITNESS.

Creditor attesting to be admitted a witness.

XVI. And be it further enacted, That in case by any will any real or personal estate shall be charged with any debt or debts, and any creditor, or the wife or husband of any creditor, whose debt is so charged, shall attest the execution of such will, such creditor (*r*), notwithstanding such charge, shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof.

EXECUTOR ATTESTING WITNESS.

Executor to be admitted a witness.

XVII. And be it further enacted, That no person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof (*s*).

REVOCATION BY MARRIAGE.

Will to be revoked by marriage.

XVIII. And be it further enacted, That every will made by a man or woman shall be revoked by his or her marriage (*t*)

Evidence Acts.

(*q*) The Wills Act is expressly exempted from the operation of the Law of Evidence Acts, 6 & 7 Vict. c. 85 (see sect. 1), and 14 & 15 Vict. c. 99 (see sect. 5).

(*r*) It would seem that there is here an accidental omission of the words "or the wife or husband of such creditor." But notwithstanding this verbal omission, the wives and husbands of creditors whose debts are charged by the will, would, by construction, be admissible witnesses.

(*s*) See *Re Hannam* (7 No. Cas. 437, 14 Jur. 558); *Re Amiss* (2 Rob. 116, 7 No. Cas. 274); *Munday v. Slaughter* (2 Cur. 72).

Revocation by marriage.

(*t*) Marriage on the day of, but subsequent to, the execution of a will, now operates as a revocation, even though it appear from the will itself

(except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor or administrator, or the person entitled as his or her next of kin under the statute of distributions) (*u*).

REVOCATION BY PRESUMPTION.

XIX. And be it further enacted, That no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances (*v*).

No will to be revoked by presumption.

that the testator did not intend it to take effect until after the marriage (*Otnay v. Sadleir*, 4 Ir. Jur., N. S. 97; 33 L. T. 46).

Revocation by marriage.

As to revocation by marriage, under the old law, see note to Prec. XII, *post*.

By the marriage of a testator in July, 1837, and the birth of a child, followed by the death of the testator in 1841, his will made in 1834 was revoked (*Walker v. Walker*, 2 Cur. 854; see also *Re Cadynwold*, 1 Sw. & Tr. 34). And where a testator made a will in 1806, married in 1839, and died, leaving a widow, who never had any child by him, his will of 1806 was held not to be revoked by the marriage (*Re Shirley*, 2 Cur. 657). But as to alteration made after the Act came into operation in a will dated before that period, see *Hobbs v. Knight*, *Brooke v. Kent*, *post*, notes to ss. 21, 34.

Will dated before 1838.

A naturalized British subject married the half-sister of his deceased wife. The marriage was solemnized in 1846 at Frankfort, and was there valid. The husband died domiciled in England, and left issue of his second marriage. The Court held that he was bound by the statute 5 & 6 Will. 4, c. 54, and that his will made prior to the second marriage was not revoked (*Re Mette*, 7 W. R. 543; *Mette v. Mette*, 1 Sw. & Tr. 416).

Marriage with a deceased wife's sister.

If a man makes a will, and afterwards marries his deceased wife's sister, who survives him, probate will not be granted of the will as unrevoked, unless the pretended widow is cited (*Re Smith*, 18 Jur. 180). And as to granting probate to a reputed wife, see *Re Hale* (5 No. Cas. 258).

(*u*) As to this exception, see *Logan v. Bell* (1 C. B. 872), *Vaughan v. Vanderstegen* (2 Drew. 168), *Re Fitzroy* (1 Sw. & Tr. 133, 6 W. R. 863), *Hawksley v. Barrow* (L. R., 1 Prob. 147), *Re Fenwick* (*ib.* 319), Sugd. R. P. Stat. 348. The reason of the exception is, that a revocation of the will in a case to which the exception applies would operate only in favour of those entitled in default of appointment, and the new family of the testator would derive no benefit whatever from it (1 Wms. Exors. 194, n. (*t*)).

(*v*) See note to section 23, *post*.

REVOCATION BY SUBSEQUENT WILL OR CODICIL OR
DESTRUCTION OF INSTRUMENT.

No will to be
revoked but
by another
will or co-
dicil, or
writing, or by
destruction.

XX. And be it further enacted, That no will or codicil, or any part thereof, shall be revoked otherwise than as afore-said, or by another (*w*) will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will

Will may be
made up of
several sepa-
rate and sub-
stantive do-
cuments.

(*w*) A testator's testamentary dispositions may be comprised in several separate and substantive documents (*Re Luffman*, 5 No. Cas. 183; *Foley v. Vernon*, 7 No. Cas. 119). Writings appointing executors (*Richards v. Queen's Proctor*, 18 Jur. 540), or beginning "This is my last will" (*Cutto v. Gilbert*, 9 Moo. P. C. 131; *Freeman v. Freeman*, 5 D. M. & G. 709; *Stoddart v. Grant*, 1 Macq. 163, 19 L. T. 305), but containing no revoking clause (*Re Sinclair*, 3 Cur. 746, 7 Jur. 803), are not necessarily substantive wills in the sense that, if there be two such writings, the latter will revoke the earlier in date. See also *Lemage v. Goodban*, L. R., 1 Prob. 57; *Re Fenwick*, *ib.* 319. But where there were two well executed substantive and inconsistent wills, one of 1838, the other of 1839, the latter, disposing of the whole of the testator's property, though containing no clause of revocation, nor any appointment of executors, was held to have revoked the former (*Henfrey v. Henfrey*, 4 Moo. P. C. 29; 2 Cur. 468; 6 Jur. 355; see also *Re Lady E. M. Montagu*, 7 No. Cas. 292).

Two sub-
stantive and
inconsistent
wills.

Plenty v.
West. Three
testamentary
papers.

A testator left three testamentary papers; the two last in date were alone admitted to probate by the Ecclesiastical Court, although they disposed but partially of his property, and the first in date, although it disposed of the whole of his property, was rejected (*Plenty v. West*, 1 Rob. 264, 9 Jur. 458). But the Court of Common Pleas (6 C. B. 201) certified, that as to the real estate, the last of the three papers alone constituted the last will; and this opinion was adopted by the M. R. (16 Be. 173).

Where probate is granted of two or more testamentary papers as together containing the last will of the deceased, the grant is made to all the executors named in the several papers (*Re Morgan*, L. R., 1 Prob. 323).

A married woman made a will in 1848 in execution of a power, and made a second will in 1857 in execution of another power; the second will contained a general revocatory clause, but did not refer to the will of 1848, or to the power in execution of which it was made, or to the property thereby appointed: it was held that the will of 1848 was not revoked (*Re Joys*, 30 L. J., N. S., Prob. 169). See also *Re Merritt* (1 Sw. & Tr. 112), *post*, note to sect. 27.

The Act has repealed the doctrine of the revocation of wills by alteration of estate, and requires in the instrument of revocation an express declaration, or words amounting to an express declaration, of an intention to revoke (*Ford v. De Pontès*, 30 Be. 572; *De Pontès v. Kendall*, 10 W. R. 69). And a will is not revoked by mere abandonment; to operate as a re-

is hereinbefore required to be executed, or by the (x) burning,

vocation, there must be some unequivocal act done, of the nature specified in the 20th section (*Andrew v. Motley*, 12 C. B., N. S. 514).

(x) The word "cancelling" was advisedly omitted from this section Cancelling.
(Sugd. R. P. Stat. 353), contrary to the recommendation of the Real Property Commissioners (4 R. P. Com. Rep., Prop. 10, p. 81); and, therefore, probate will be granted of a will in its original shape, though a pen has been drawn through the body of the will, and through the testator's signature, the attestation clause, and the names of the witnesses (*Stephens v. Taprell*, 2 Cur. 458; *Re Fary*, 15 Jur. 1114; *Shaw v. Thorne*, 4 No. Cas. 649. See also *Re Brewster*, 6 Jur., N. S. 56; *Re De Bode*, 5 No. Cas. 189).

That a will may be revoked by tearing it is not necessary to rend the will into more pieces than it originally consisted of; but it is sufficient if the testator intended the tearing actually done of itself to work a revocation, without any further act (*Elms v. Elms*, 1 Sw. & Tr. 155). Mutilation of will.

That a will may be revoked in part only, by tearing, see *Christmas v. Whinyates* (3 Sw. & Tr. 81, 1 N. R. 336, 11 W. R. 371).

From the peculiar manner in which the mutilation (by cutting and tearing) of a duly executed will was made, the Court held the will not to be totally revoked, but to have been altered so as to form the draft for a new will; and probate was granted of the will as it stood after the mutilation (*Clarke v. Scripps*, 2 Rob. 563, 16 Jur. 783); and if the mutilation may have been accidental, the state of the paper will be considered (*Bigge v. Bigge*, 9 Jur. 192).

If the mutilation of a will take place with a view to the execution of a new will, and the new will be not executed, the prior will, as it stood before mutilation, will be entitled to probate (*Re Cockayne*, D. & Sw. 177; *Elms v. Elms*, 1 Sw. & Tr. 155. See also *Re Eeles*, 2 Sw. & Tr. 600). Mutilation, with a view to the execution of a new will.

Where a will is destroyed on the incorrect assumption that a subsequent will is well executed and operative, the first will is not revoked, and secondary evidence of its contents will be admitted (*Re R. L.*, 29 L. T. 26; *Scott v. Scott*, 1 Sw. & Tr. 258, 5 Jur., N. S. 228; *Re Middleton*, 3 Sw. & Tr. 583). On the assumption that a subsequent will is well executed.

But if parts of a will are obliterated by pen and ink so as to be illegible (*Townley v. Watson*, 3 Cur. 761), or cut away, as with a knife or a pair of scissors (*Re Cooke*, 5 No. Cas. 390), there is a revocation as to the obliterated or destroyed parts. See also *Re Lambert* (1 No. Cas. 131). By pen and ink.
By cutting.

A will made before 1838 is revoked by the testator's, after 1st January, 1838, cutting out the signature (*Hobbs v. Knight*, 1 Cur. 768; *Walker v. Armstrong*, 21 Be. 305, on appeal, 4 W. R. 770). Cutting out signature.

Where a testator, having duly executed his will, subsequently, in the presence of his executor, partially erased his own signature, with the intention of writing it in better style, and thereupon wrote it again in the presence of the executor, but not of the attesting witnesses, the instrument Animus revocandi.

Sect. 20.

tearing, or otherwise destroying the same, by the testator, or

was admitted to probate, the original signature being taken as restored (*Re Kennett*, 2 N. R. 461).

Will burnt
by testator
by mistake,
or in a fit of
madness.

The act of destruction of a will must be done *animo revocandi*, and must be complete, in order that the will may be revoked. Therefore, where a duly executed will has been burnt by mistake (*Re Thornton*, 2 Cur. 913), or by the testator in a fit of madness (*Re Downer*, 18 Jur. 66), probate will be allowed of a copy or draft; or if a will is cancelled with the intention of making another, which intention is prevented by incapacity, probate will be granted of the cancelled will (*Re Smith*, 1 No. Cas. 315). And where a will was executed by a testator when sane, he subsequently becoming insane, and the will was found mutilated at his death, it was held that the *onus* of proof, that the testator mutilated his will whilst sane, lay upon those who contested the will (*Harris v. Berrall*, 1 Sw. & Tr. 153, 7 W. R. 19).

Cutting off
witness's
signature.

A will once well executed is not revoked by the cutting off, with the privity of the testator, of the signature of one of the witnesses, for the purpose of its being re-written (*Re Tozer*, 7 Jur. 134). See also *Re Coleman* (2 Sw. & Tr. 314). But where a testator, *animo revocandi*, tears off the seal and a syllable of a word in the body of the will (*Price v. Powell*, 3 H. & N. 341, 6 W. R. 597), or the signature and attestation clause (*Re Lewis*, 1 Sw. & Tr. 31, 30 L. T. 353), or the attestation clause and the names of the witnesses (*Abraham v. Joseph*, 5 Jur., N. S. 179), or the names of the witnesses only (*Evans v. Dallow*, 31 L. J., Prob. 128), this is a complete revocation. See also *Re James* (7 Jur., N. S. 32).

Tearing off
seal and part
of will.

Where a will was found with the testator's signature torn off the first four sheets, and a pen run through the signature upon the fifth and last sheet, and there was evidence produced of an intention to revoke, the will was held to be revoked (*Williams v. Tyley*, Joh. 530). See also *Re Simpson* (5 Jur., N. S. 1366), *Re Harris* (3 Sw. & Tr. 485).

Will torn,
and pen
drawn
through tes-
tator's sig-
nature.

Tearing in a
fit of anger.

The question whether a will was revoked by a testator's tearing it in a fit of anger into four pieces, where he afterwards desired his housekeeper to sew them together again, was raised but not decided in *Re Colberg* (2 Cur. 832).

As to revo-
cation of
codicils by
destruction of
will.

Under the old law, a codicil was *primâ facie* dependent on the will, and the destruction of the will was an implied revocation of the codicil (1 Wms. Exors. 148), but the destruction of a will was not, and is not now, necessarily a revocation of the codicils. That a codicil may be revoked under the new law, there must be an intention shown to destroy it, as well as the will. This would appear to have been the opinion of Sir *H. J. Fust* in *Clogstoun v. Wolcott* (5 No. Cas. 623, 12 Jur. 422), in which case his Honour said, "Under the old law the effect of destroying a will was by presumption to defeat the operation of the codicils to that will, but by the present law there must be an intention to destroy." But in *Grimwood v. Cozens* (2 Sw. & Tr. 364, 5 Jur., N. S. 497), Sir *C. Cresswell*—after say-

by some person in his presence and by his direction (*y*), with the intention of revoking the same (*z*).

ing, "I think it has been established by the cases cited at the bar, that, previous to the passing of 1 Vict. c. 26, a codicil was *primâ facie* dependent on the will, and that the destruction of the latter was an implied revocation of the former; and, moreover, that Sir *H. J. Fust* was of opinion that no alteration of this principle was made by the passing of the statute; the question then is entirely one of the intention of the deceased"—held that a codicil, through the witnesses' signatures to which a pen had been drawn, was revoked on account of the will not being forthcoming at the testator's death; and it was held that it lay upon the party applying for probate of a codicil to show that the deceased intended it to operate separately from the will. And see *Re Dutton* (3 Sw. & Tr. 66, 32 L. J., Prob. 137); and the note to sect. 22, *post*, p. 40.

(*y*) The power to revoke a will in the testator's absence cannot be delegated; therefore the direction by a testator that his will shall be destroyed, either in his life-time (*Rooke v. Langdon*, 2 L. T. 495; *Re Dadds*, D. & Sw. 290, 29 L. T. 99), or after his death (*Stockwell v. Ritherdon*, 1 Rob. 661, 12 Jur. 779), is inoperative, the Act requiring the destruction to be in the presence, and by the direction of the testator. So where a will was burnt by the direction, but not in the presence of the testator, the draft was admitted to probate (*Re Dadds*, *ubi sup.*). And where a wife destroyed her husband's will without his consent, the Court, on admitting a copy of the will to probate, ordered the costs to be paid by the wife (*Horne v. Horne*, Prob. Ct. Dec. 1859).

Revocation.

(*z*) Where a will, which is traced into the hands of a testator (*Patten v. Poulton*, 1 Sw. & Tr. 55, 6 W. R. 458), or that part of a will executed in duplicate which is retained by the testator in his own possession (*Saunders v. Saunders*, 6 No. Cas. 518), is not forthcoming at the testator's death, the presumption of law is, that it has been destroyed by him *animo revocandi*; this presumption may be rebutted by circumstances (*ib.*; see also *Re Hains*, 5 No. Cas. 621; *Battyll v. Lyles*, 4 Jur., N. S. 718; *Whiteley v. King*, 5 N. R. 12), but will prevail until it is rebutted by satisfactory evidence (*Eckersley v. Platt*, L. R., 1 Prob. 281).

Will not forthcoming at testator's death.

The cases under the old law upon wills executed in duplicate are collected in Sugd. R. P. Stat. 350 (n.). See also 1 Wms. Exors. 148, *Doe v. Strickland* (8 C. B. 724). Those cases are applicable to the new law.

Duplicate wills.

Where a portion of a will was found locked up in the testator's bureau, the first sheet, containing the substance of the will, being detached and missing, it was held, on the presumption of law, that the mutilation was done by the testator *animo revocandi* (*Williams v. Jones*, 7 No. Cas. 106). But where a will, which had been well executed, was found after the testator's death, with his signature erased, and his name re-written a little below the place of the first signature, it was held that this erasure had not been made *animo revocandi*, and probate was allowed with the original signa-

Part only of a will found at testator's death.

OBLITERATIONS AND INTERLINEATIONS.

No alteration, except in certain cases, in a will, shall have any effect, unless executed as a will.

XXI. And be it further enacted, That no obliteration, interlineation (*a*), or other alteration, made in any will after the execution thereof shall be valid or have any effect (*b*), except

Last sheet missing.

ture restored, and the second signature omitted (*Re King*, 2 Rob. 403). And see *Re Kennett* (2 N. R. 461; *ante*, p. 34).

A will on six or eight sheets was signed by the testator and by witnesses; after the testator's death two only of the inner sheets were found; as the last sheet, upon which alone was the execution required by the statute, was not forthcoming, the Court presumed a revocation (*Re Gullan*, 1 Sw. & Tr. 23, 6 W. R. 307; *Gullan v. Grove*, 26 Be. 64).

Codicil not forthcoming.

And so a codicil not found with the will and other codicils is presumed to have been revoked (*Re Shan*, 1 Sw. & Tr. 62, 31 L. T. 41.)

Probate of copy, or of substance of will.

If a will be lost or destroyed, without the intention of revoking it, and the substance thereof can be ascertained by means of the original instructions, or by a copy of the will, or by the recollection of persons who heard it read over, probate will be granted of a paper embodying such substance (*Taylor*, Evidence, 430; *Brown v. Brown*, 8 E. & B. 886; *Re Langtry*, 1 N. R. 194; *Re Pechell*, 6 Jur., N. S. 405; *Re Gardner*, 27 L. J., Prob., 55). But in *Wharram v. Wharram* (3 Sw. & Tr. 301) it was intimated that in *Brown v. Brown*, and other cases decided since the Wills Act, the operation of the Act had not been sufficiently considered. The proof of a will that has been destroyed or lost is viewed by the Court with jealousy and mistrust (*Quick v. Quick*, 3 Sw. & Tr. 442; *Moore v. Whitehouse*, *ib.* 567); the due execution of the will, and its existence after the death of the testator, should be proved, and a satisfactory explanation given of the circumstances attending the destruction or loss (see *Burls v. Burls*, L. R., 1 Prob. 472). As a general rule, a draft or copy is required to be propounded before admitting it to probate, though probate of a draft may be obtained on motion (*Re Barber*, L. R., 1 Prob. 267).

(*a*) As to interlineations, see *Re White* (6 Jur., N. S. 808).

Alterations presumed to be made after execution.

(*b*) Alterations, unaccounted for, appearing on the face of a will, are, as to personality, presumed to have been made after the execution, and are therefore held not to form part of the will (*Burgoyne v. Showler*, 1 Rob. 10, 8 Jur. 814; *Cooper v. Bockett*, 4 Moo. P. C. 419, 1 No. Cas. 93, 10 Jur. 931; *Greville v. Tylee*, 7 Moo. P. C. 320; *Lushington v. Onslow*, 6 No. Cas. 183, 12 Jur. 465; and see *Gann v. Gregory*, 3 D. M. & G. 777). The same is true as to real estate (*Simmons v. Rudall*, 1 Sim., N. S. 115; *Doe v. Catamore*, 16 Q. B. 745, 15 Jur. 728; *Doe v. Palmer*, 16 Q. B. 747, 15 Jur. 836). Or perhaps it is more correct to say that there is no absolute presumption of law, one way or the other, but that the *onus* is cast upon the person seeking to derive advantage from an alteration, to

so far as the words or effect of the will before such alteration

adduce evidence to show that the alteration was made before execution (*Williams v. Ashton*, 1 J. & H. 115).

Alterations in will.

But in *Keigwin v. Keigwin* (3 Cur. 607, 7 Jur. 840), alterations were, under the circumstances, presumed to have been made before execution; in *Re Dowager Countess of Morton* (13 Jur. 1108) a sheet substituted for an original sheet of the will was assumed to have been substituted before execution; and in *Re Hindmarch* (L. R., 1 Prob. 307) some trifling alterations and interlineations in a holograph will were admitted to probate on the opinion of an expert that they were written at the same time as the rest of the will. And see *Re Cadge* (*ib.* 543), where a distinction was taken between interlineations and alterations.

Where several undated interlineations appeared in a will, upon evidence of the parol declarations of the testator made before the date of the will, one of those interlineations was admitted to probate (*Re Foley*, 25 L. T. 311). Verbal and written statements made by a testator in and about the making of his will, when accompanying acts done by him in relation to the same subject, are admissible as evidence of the contents of the will (*Johnson v. Lyford*, L.R., 1 Prob. 546). But parol declarations made after the date of the will are inadmissible (*Doe v. Palmer*, 16 Q. B. 747, 15 Jur. 836; *Re Ripley*, 1 Sw. & Tr. 68, 6 W. R. 460; *Staines v. Stewart*, 2 Sw. & Tr. 320, 8 Jur., N. S. 440; *Quick v. Quick*, 3 Sw. & Tr. 442).

Parol declarations before date of will, admissible.

And after date of will, inadmissible.

Blanks left in a will were found filled up by the testator, as to part in black ink and as to the rest in red ink; upon the circumstances of the case the former were held to have been filled in before the execution, the latter after the execution of the will (*Birch v. Birch*, 1 Rob. 675, 12 Jur. 1057). But see *Re Bacon* (3 No. Cas. 645).

Blanks filled up in black and red ink.

The mere circumstance of the amount of a legacy or the name of a legatee being inserted in different ink, and in a different handwriting, does not alone constitute an "obliteration, interlineation, or other alteration," within the meaning of the statute, nor does any presumption arise therefrom against a will having been duly executed in the form in which it appears. The case is different where there is an erasure apparent on the face of the will, and that erasure has been "superinduced by other writing." In such circumstances, the *onus* lies upon the party who alleges such alteration to have been made prior to execution, to prove by extrinsic evidence that the words were inserted before execution, and that they had the sanction of the testator (*Greville v. Tylee*, 7 Moo. P. C. 320).

Parts of will in different ink or handwriting.

Where alterations, obliterations and erasures appear on the face of a will, all the witnesses must join in the affidavit produced on the demand of probate; or the absence of a witness should be explained and accounted for (*Re Townsend*, 5 No. Cas. 146).

Affidavits of witnesses.

In *Gann v. Gregory* (3 D. M. & G. 777); *Shea v. Boschetti* (18 Be. 321; 18 Jur. 614); *Re Kendall* (4 No. Cas. 317); *Re Smith* (3 Sw. & Tr.

Probate in fac simile.

Sect. 21.

shall not be apparent (*c*), unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will (*d*); but the will, with such alteration as part

589), probate was granted in *fac simile*. In *Gann v. Gregory*, Lord Cranworth, C., held that the will was to be read as if the parts through which ink lines had been run formed no part of the will.

Production,
in Court of
construction,
of original
will.

In construing a will of personality, the Court, notwithstanding an objection that the probate only could be looked at, ordered the original will to be produced, and had regard to certain erasures therein, which had been omitted from the probate (*Manning v. Purcell*, 7 D. M. & G. 55).

Unattested
erasures.

(*c*) The obliteration of a bequest, with the addition of the unattested words "erased by me, M. L.," written by the testator, is not a revocation, if the original words are "apparent" on the face of the will, and to ascertain this fact the evidence of engravers and other experts and the use of magnifying glasses are admissible (*Cooper v. Bockett*, 4 Moo. P. C. 419, 10 Jur. 935; *Re Oppenheim*, 17 Jur. 306; *Re Ibbetson*, 2 Cur. 337; 4 R. P. Com. Rep. 31).

Evidence of
experts.

As to the evidence of experts, see *Re Rushout* (13 Jur. 458); *Re Abbey* (5 No. Cas. 615).

Obliteration
with unat-
tested sub-
stitution.

And where a testator, by means of an erasure made with a knife, intended to revoke a legacy, and then by writing over the erasure to substitute a sum different from that originally given, such substituted legacy, if unsigned and unattested, is not effectually given, the original legacy is not revoked, although its amount is no longer "apparent," and parol evidence is admissible to show what the original legacy was (*Brooke v. Kent*, 3 Moo. P. C. 334; see also *Re Reeve*, 13 Jur. 370; *Re Beavan*, 2 Cur. 369; *Soar v. Dolman*, 3 Cur. 121; *Re Ibbetson*, 2 Cur. 337), and probate will be granted of the will in its original state. So also in the case of an unexecuted obliteration of an executor's name and substitution of another name (*Re Parr*, 6 Jur., N. S. 56; *Re Harris*, 1 Sw. & Tr. 536, 8 W. R. 368). But if the erased words are not apparent, and proof cannot be given as to the original words, probate will be granted in blank as to the erased parts (*Re James*, 1 Sw. & Tr. 238; *Re Livock*, 1 Cur. 906).

"Apparent,"
meaning of.

The word "apparent" seems to mean "apparent on an inspection of the document itself," and not "capable of being made apparent by extrinsic evidence" (1 Wms. Exors. 139; *Townley v. Watson*, 3 Cur. 764).

Obliteration
without sub-
stitution.

But where the whole of the words forming the gift of a legacy (*Townley v. Watson*, 3 Cur. 761, 8 Jur. 111) are, *animo revocandi*, and without any intention of substituting another gift, so obliterated by the testator with pen and ink as to be illegible, this is a complete revocation of the legacy, and parol evidence will be inadmissible to restore the will.

Interline-
ations, &c.
must be duly
identified.

(*d*) The presumption that alterations and obliterations were made after the execution, holds even where a codicil has been well executed (*Rowley v. Merlin*, 6 Jur., N. S. 1165; *Christmas v. Whinyates*, 3 Sw. & Tr. 81,

thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration (e), or at the foot or end of or opposite to a memorandum referring to such alteration and written at the end or some other part of the will (f).

REVIVAL OF REVOKED WILL.

XXII. And be it further enacted, That no will or codicil or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and when any will or codicil

No will revoked to be revived otherwise than by re-execution, or a codicil.

11 W. R. 371). To rebut this presumption, alterations and obliterations in a will must be referred to and identified in the subsequent well-executed codicil, or be proved to have existed before the date of the codicil (*Re Mills*, 11 Jur. 1070; see also *Re Parker*, 27 L. T. 18; *Re Mogg*, 1 No. Cas. 325; *Re Wyatt*, 2 Sw. & Tr. 494; 10 W. R. 783).

Alterations, &c. must be identified.

But if the alterations are not referred to, or identified, or proved to have existed before the date of the codicil, the alterations are not admitted to probate (*Re Bradley*, 5 No. Cas. 95, 186; *Swete v. Pidsley*, 6 No. Cas. 189). Nor are unattested additions to a will made part of the testamentary instrument by a subsequently well-executed codicil, beginning, "By this codicil to my will" (*Haynes v. Hill*, 1 Rob. 747; but see *Re Tegg*, 4 No. Cas. 531; *Neate v. Pickard*, 2 No. Cas. 407).

Not identified.

(e) The names (*Re Wingrove*, 15 Jur. 91) or the initials (*Re Hinds*, 16 Jur. 1161) of the testator and witnesses placed in the margin of the will near the alteration are sufficient to make the alteration part of the will, without any memorandum of attestation referring to the alteration.

Alterations well attested by initials of testator and witnesses in the margin;

On the second execution of a will, alterations which had been made after its first execution were attested by the witnesses only, by their putting their initials opposite to the alterations. But as the testatrix did not sign opposite to the alterations, although she traced a dry pen over her previous signature at the foot of the will, and as there was no fresh memorandum of attestation, and no fresh subscription by the witnesses, probate of the alterations was refused (*Re Martin*, 1 Rob. 712, 6 No. Cas. 694; *Re Cunningham*, 29 L. J., Prob. 71; but see *Re Dewell*, 17 Jur. 1130).

but not by signature of witnesses only.

(f) As to the necessity for affidavits of execution in the case of the testator and witnesses writing their names or initials in the margin or near to the alterations, or in the case of a memorandum referring to the alterations, see 15 Jur. 91, (n.); and as to the evidence required by the Court of Probate to prove the execution of a will, see *Belbin v. Skeats*, ante, p. 20.

Affidavits.

Sect. 22.

which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown (*g*).

Implied re-
vival of will
abolished.

(*g*) As in the preceding sections the object of the legislature appears to have been to put an end to implied revocations of testamentary papers, so by the 22nd section their aim is to do away with implied revivals. It should seem that the "intention to revive" a revoked will by a codicil, which is required by this section, can be shown only by the contents of the codicil itself, and that no act *dehors* the codicil can be resorted to for the purpose of establishing the intention (*Marsh v. Marsh*, 1 Sw. & Tr. 528, 35 L. T. 523). In that case, no less than twenty-seven executed wills and codicils were found after the testator's death, besides a large number of incomplete testamentary papers. A codicil of 1858 was tied by a piece of tape to a will of 1851, which will had been revoked by another will of 1856: it was held, that this merely physical annexation of the codicil was no ground for inferring the intention to revive required by section 22, and probate was granted of the will of 1856 and the codicil of 1858.

Destruction
of revoking
instrument.

Extrinsic
evidence.

A duly executed will, if once revoked by a subsequent will containing a clause of revocation, is not revived by the destruction of such subsequent will (*Major v. Williams*, 3 Cur. 432, 7 Jur. 219; *Stride v. Sandford*, 17 Jur. 263); and parol evidence of an intention to revive the will is inadmissible (*ib.*) And see *Dickinson v. Swatman* (30 L. J., N. S., Prob. 84); *Powell v. Powell* (L. R., 1 Prob. 209).

But extrinsic evidence was admitted to show with what object a testator had republished a will which, as to one bequest, he had varied by a codicil dated prior to such republication (*Uppill v. Marshall*, 7 Jur. 819; *Wade v. Nazer*, 1 Rob. 632, 12 Jur. 188). In the latter case, the re-execution of the will alone was held not to revoke a codicil to that will.

*Cutto v. Gil-
bert.*

A testator duly executed his will, and afterwards executed another will, which was not found at his death; of the contents of the second, nothing was known, except that it was headed "last will and testament;" it was held in the Prerogative Court that the former will (which was found at the testator's death) was revoked by the latter, that the former was not revived by the second will's not being forthcoming, and that there was an intestacy; but this decision was reversed by the Privy Council (*Cutto v. Gilbert*, 9 Moo. P. C. 131; 18 Jur. 560; 24 L. T. 193). But if, under similar circumstances, it can be proved, by strong and conclusive evidence, that the second will revoked the first, there is an intestacy (*Re Brown*, 1 Sw. & Tr. 32; 30 L. T. 353; *Brown v. Brown*, 8 E. & B. 886; *Wood v. Wood*, L. R., 1 Prob. 309; see also *Plenty v. West*, 6 C. B. 201; *Re Gardner*, 1 Sw. & Tr. 110).

Legacy, sub-

Where a sum of 100*l.* was given by will to a legatee, afterwards in sub-

REVOCATION—SUBSEQUENT CONVEYANCE.

XXIII. And be it further enacted, That no conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death (*h*).

A devise not to be rendered inoperative by any subsequent conveyance or act.

stitution a sum of 500*l.* was given by a codicil to the same legatee, and then the latter gift was revoked; the legatee was not entitled to the 100*l.* (*Boulcott v. Boulcott*, 2 Drew. 25).

stitution by codicil, and revocation of codicil.

A testator in 1837 executed his will in duplicate, one part being kept by himself, the other by his solicitor; on the occasion of the execution in 1838 by the testator of a second will, revoking in terms the prior one, the part of the prior will in the possession of the solicitor was destroyed by the testator, but the part in the testator's possession remained untouched, down to the time of his death. In 1839 the testator made a codicil, which referred to the will of 1837 by its date, that will was held to be revived, and parol evidence was not admitted to prove a mistake in the date (*Payne v. Trappes*, 1 Rob. 583, 11 Jur. 155). See also *Re Chapmen* (1 Rob. 1); *Re Goodenough* (2 Sw. & Tr. 141; 30 L. J., N. S., Prob. 166); *Re Lewis*, (7 Jur., N. S. 220); *Re Wyatt* (2 Sw. & Tr. 494; 10 W. R. 783). A will which has been revoked, in order that it may be revived by a subsequent codicil, must be in existence at the date of the reviving codicil, and must be clearly identified (*Newton v. Newton*, 12 Ir. Ch. Rep. 118). If there is any doubt or ambiguity with respect to the document referred to by the testator, extrinsic evidence will be admissible (*Thomson v. Hempenstall*, 7 No. Cas. 141, 13 Jur. 814; *Quincey v. Quincey*, 11 Jur. 111). And the execution by a testator, after his marriage, of a codicil referring to "my last will" (there being only one will in existence), was held to revive a will made before the testator's marriage (*Neate v. Pickard*, 2 No. Cas. 407).

Revival of will.

Reference to prior instrument.

Extrinsic evidence.

Under the circumstances detailed in *Hale v. Tokelove* (2 Rob. 319, 14 Jur. 817), there were admitted to probate two codicils only; one executed will, and the draft of another will, referred to in one of the codicils, being rejected: and in *Re Dendy* (15 Jur. 1042), a will, and the first and fourth codicils only, were admitted to probate.

Two codicils only admitted to probate.

See also *Re Terrible* (1 Sw. & Tr. 140); *Re Harper* (7 No. Cas. 44, the marginal note to which requires correction); and the note to sect. 20, *ante*, p. 34.

(*h*) Revocation by alteration of estate is abolished; revocation must now be by express declaration in writing, or by the use in the revoking instru-

Revocation by alteration of estate abolished.

ment of words equivalent or amounting to express declaration (*Fford v. De Pontès*, 30 Be. 572).

As to unpaid purchase-money of real estate specifically devised.

Under this section it has been held that, where a testator subsequently to his will contracted for the sale of an estate which he had specifically devised, and the contract remained uncompleted at his decease, the purchase-money belonged to his personal representatives as part of his personal estate, and not to the devisees of the property, the testator having, at the time of his death, merely a claim for the purchase-money, with a lien on the estate for its payment, which lien, it was considered, was not such an interest as was in the contemplation of the legislature in the concluding part of this section (*Farrar v. Earl of Winterton*, 5 Be. 1).

And where the title-deeds were deposited as security for unpaid purchase-money.

And the result is not varied by the fact, that the purchaser had deposited the title-deeds of the sold property with the vendor, as security for part of the purchase-money; Sir *L. Shadwell*, V. C. E., observing that the clause applied to cases where testators, having devised their estates, made conveyances of them, merely modifying the ownership, and not to such cases as the one before him, where the thing to be given was gone (*Moor v. Raisbeck*, 12 Sim. 123). Nor by the fact that the sale was compulsory under the powers of a private Improvement Act (*Ex parte Hawkins*, 13 Sim. 569), or a Railway Act (*Re The Manchester and Southport Railway Company*, 19 Be. 365). See also *Haynes v. Haynes* (1 Dr. & S. 426); *Re Bagot's Settlement* (31 L. J., Eq. 772, 10 W. R. 607); *Andrew v. Andrew* (8 D. M. & G. 336); Sugd. R. P. Stat. 360.

Option to purchase after testator's death.

But where a testator has given an option to A. to purchase an estate of the testator's after his death, which option is accepted and the purchase completed, the purchase-money, if the estate be *specifically* devised, devolves according to the limitations of the will, in the same way as the estate would have done in case A. had not decided to purchase (*Emuss v. Smith*, 2 De G. & S. 722).

Gale v. Gale.

Real estate was conveyed to trustees upon trust, after certain life estates, for such persons as A. should by deed or will appoint, and, in default, for the children of five persons named. The trustees were empowered, with the consent of the life-tenants, to sell the settled property, and invest the proceeds in other real estate to be settled to the same uses. A. in exercise of his power, by will dated in 1846, appointed the settled estate to trustees upon trust to sell and to pay the proceeds to the children of B., and he devised all other his real estate, not thereinbefore specifically disposed of, to his wife. In 1849 the trustees of the settlement, with the requisite consents, sold the settled estate; but on the death of A., which took place in 1850, the purchaser's conveyance was not executed by one of the trustees, and the purchase-money was unpaid. It was held that there was an ademption, that the appointment by the will of A. had no effect, either on the new estate to be purchased with the produce of the settled estate or on the purchase-money which stood in its place; and that the widow and residuary

WILL SPEAKS, FROM WHAT PERIOD.

XXIV. And be it further enacted, That every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will (i).

A will shall be construed to speak, as to estate comprised, from the death of the testator.

legatee of A. was entitled to the purchase-money of the settled estate (*Gale v. Gale*, 21 Be. 349).

The will of A. (entitled under the uses of a settlement to the reversion in fee of settled lands) was made before 1838; it was held to be revoked by a deed dated after 1838, revoking the uses of the settlement, and limiting the settled estates to A. in fee, and that the reversion in fee of which A. was seised at the time of his death, did not pass by the will (*Lord Langford v. Little*, 2 J. & L. 613; see also *Walker v. Armstrong*, 21 Be. 284; *Comper v. Mantell*, 22 Be. 223, 231).

Reversion, devise of, before 1838, revoked.

By a bequest of "all my Great Western Railway shares and all other the railway shares which I shall be possessed of at the time of my death cease to A.," it was held that there passed to the legatee the testator's Great Western Railway shares, which he had at the time of making his will, though after that time they were duly converted into consolidated stock, under the authority of an act of parliament; but that consolidated stock in the same company, purchased by the testator after the date of his will, did not pass (*Oakes v. Oakes*, 9 Ha. 666). See also *Re Pilkington's Trusts* (6 N. R. 246).

Railway shares converted into stock.

(i) This section makes a will speak, with reference to the property comprised in it (*i. e.* with reference to any gift contained in the will, see *Gibson v. Gibson*, 1 Drew. 61, 62), and only as to the property comprised in it, as from the death of the testator; it does not extend to the testator's capacity, so as to render valid a will executed during minority of a testator who died after attaining majority (see note to sect. 7, *ante*, p. 9); or (it is apprehended) so as to make good the will, executed during coverture, of a testatrix who died a widow (see *Re Wollaston*, 9 Jur., N. S. 727); nor does it extend to the objects of the testator's bounty (Sugd. R. P. Stat. 330). Thus, where a sum of money was bequeathed to trustees, upon trust for A. for life, or until her marriage, and A., who was a widow at the date of the will, married again in the testator's lifetime, and the testator died without re-executing his will, it was held that A. was not entitled to any interest under the will (*Bullock v. Bennett*, 7 D. M. & G. 283).

Will speaks from death, as to property only.

It would seem also that sect. 24 is not applicable to the construction of a clause excepting property from the operation of the will; see *Hughes v. Jones* (1 H. & M. 765).

But, so far as the property comprised in the will is concerned, to exclude the application of this section, the "contrary intention" must appear on the will, and must have a continuing operation down to the death of the

testator. The will must be taken as if executed immediately before the death, and when so taken must show a "contrary intention" (*Thomas v. Jones*, 1 D. J. & S. 63, 83, per Lord *Westbury*, C.)

Estate of which "I am now seised."

But a devise of all the real estate of which "I am now seised," notwithstanding this section, passes only the real estates belonging to the testator at the date of his will, and not any subsequently-acquired estates (*Cole v. Scott*, 1 M.N. & G. 518; *Hutchinson v. Barron*, 6 H. & N. 583; 9 W. R. 538; *Williams v. Owen*, 2 N. R. 585). But in *Cole v. Scott* the word "now" was used in two other parts of the will with reference clearly to its date, a fact which formed one of the grounds for the decision of the Lord Chancellor. See also *Hepburn v. Skirving* (4 Jur., N. S. 651); *Re Otley and Ilkley Railway* (34 Be. 525).

Estate of which "I am seised."

By a will dated in 1835, the testator devised in the following words, "all the freehold lands and hereditaments of or to which I or any person in trust for me am, is or are seised." By a codicil of 1845 the testator devised all the lands comprised in and devised by his said will, to uses; real estate acquired by the testator after the date of the codicil was held to pass by the will and codicil (*Lady Langdale v. Briggs*, 3 S. & G. 254; 8 D. M. & G. 391; see also *Doe v. Walker*, 12 M. & W. 591; *Lord Lilford v. Powys-Keck*, 30 Be. 300; *Stevens v. Bayley*, 8 Ir. C. L. Rep. 410; *Jepson v. Key*, 2 H. & C. 873; *Hawkins*, Constr. Wills, 18).

"My estate and effects."

And in *O'Toole v. Browne* (3 E. & B. 572), a residuary gift to executors, upon trust to sell and invest the proceeds on security, in which the words "my estate and effects" were used in connection with words applicable to personalty, was held to pass after-acquired real estate; and a like decision was given under similar circumstances in *Stokes v. Salomons* (15 Jur. 483); see also *Dobson v. Bowness* (L. R., 5 Eq. 404).

Conveyance of part of land out of which rent-charge issues.

An annuity by way of rent-charge given by will was extinguished by a subsequent conveyance by deed, by the testator to the annuitant, of part of the property charged with the annuity (*Hewson v. Carolin*, 17 L. T. 296). But now see 22 & 23 Vict. c. 35, s. 10.

"My new 3¼ per cent. annuities."

A gift of "my new three and a quarter per cent. annuities" was held to comprise all the new three and a quarter per cent. annuities which the testator had at his death (*Goodlad v. Burnett*, 1 K. & J. 341). In that case V. C. *Wood* illustrated this section thus: "If I refer to a particular thing, e.g., a ring, or a horse, and bequeath it as 'my ring,' or 'my horse,' it would seem that the contrary intention, to which the 24th section refers, 'appears by the will,' and the will speaks from the date of its execution; but when a bequest is of that which is generic, of that which may be increased or diminished, the Act requires something more on the face of the will, for the purpose of indicating such 'contrary intention' than the mere circumstance that the subject of the bequest is designated by the pronoun 'my.'" See also *Douglas v. Douglas* (Kay, 400); *Trinder v. Trinder* (L. R., 1 Eq. 695); *Re Gibson* (L. R., 2 Eq. 669).

"All the

And a gift of all the moneys "I possess in the A. bank, or in the com-

pany's funds," will pass all the moneys answering those descriptions at the death of the testator (*Hepburn v. Skirving*, 4 Jur., N. S. 651).

moneys I possess in the A. bank."

A gift of all the interest and claim of the testator on household property at P. of which the testator was mortgagee will pass arrears of interest owing at the testator's death as well as the principal (*Gibbon v. Gibbon*, 13 C. B. 211, 17 Jur. 416).

All the interest in mortgaged property.

In *Lloyd v. Davis* (15 C. B. 76, 18 Jur. 105), a devise to three daughters as tenants in common was to be varied on the marriage of any one of them; it was held that the marriage contemplated was a marriage in the testator's lifetime, or at all events within twelve months after his death; and that, in the event of no marriage taking place within that time, the proposed variation would not take effect.

Variation on marriage of daughters.

A devise of "all my Quendon Hall estates in Essex" in a will of 1844 was held not to pass small additions to what were clearly comprised in the devise, which additions were acquired by the testatrix after the date of her will, although she had contracted to purchase some of them before that date (*Webb v. Byng*, 1 K. & J. 580). But the term "Quendon Hall estates" was not a recognized appellation of any particular property, and extrinsic evidence was admitted to show what the testatrix understood to be comprised in that arbitrary designation.

"All my Quendon Hall estates."

And an exoneration "from all claims in respect of moneys laid out by me in improvements of the estates in Scotland, and which money has according to the laws of Scotland been charged thereon," was held to apply only to moneys charged at the date of the will, and not to money afterwards laid out and charged, nor even to money then laid out, but afterwards charged (*Douglas v. Douglas*, Kay, 400).

Exoneration from claims for money charged on estates in Scotland.

In each of the cases, *Price v. Parker* (16 Sim. 198) and *Trimmell v. Fell* (16 Be. 539), the will of a married woman, which was invalid on its execution from not being within the terms of the power under which the will purported to be made, was not read and construed as if executed immediately before the testatrix's death, at which period the execution would have been valid.

Married woman's will exercising power.

So also, where a fund was limited in trust for such of the children of a marriage as the husband and wife should jointly appoint, and in default of joint appointment, then as the survivor at any time or times "after the decease of the other" should by deed or will appoint, the power was not exercised by the will of the husband made in the lifetime of the wife, though he in the event was the survivor (*Cave v. Cave*, 8 D. M. & G. 131).

But if the time for the exercise of the power be not expressly defined, it would seem that a general power of appointment over an equitable estate, given to the survivor of two persons, to be executed by deed or will, would be well executed by a will made, during the lives of both the persons, by the one who in the event proved to be the survivor (Sugd. R. P. Stat. 379). Such a general power, which may be used for the benefit of the person

General power over equitable estate, given to the survivor of two persons.

General power over equitable estate, given to the survivor of two persons.

entitled to exercise it, is equivalent to ownership, and is in fact a right of exercising ownership which will certainly belong to one of two persons, though it is for the moment uncertain in which of those two it will actually become vested. A power to the survivor of two persons to declare a trust for his own benefit is not to be distinguished in principle from a trust for the benefit of the survivor; the one is a contingent trust, the other a contingent power; and as in equity a contingent interest is alienable by will, it would seem there is nothing to prevent a person who has a contingent right to appoint an estate for his own benefit from exercising that power subject to the contingency, or to prevent the instrument so executed from becoming a valid execution of the power so soon as the contingency happens. It is not necessary that the authority should exist at the time of execution of the will if it be afterwards acquired and be subsisting at the death of the testator; in such case the will is entitled to the benefit of the more liberal rule of interpretation provided by the 24th section of the Act. (It must be borne in mind that this applies only to general powers affecting equitable estates.) Thus where a general equitable power of appointment over real estate was given to the survivor of A. and B., and A., who was a married woman, but under her marriage settlement possessed testamentary capacity, made her will in 1838 in the lifetime of B., and B. afterwards died in the lifetime of A., who did not re-execute her will, it was held that a general devise of real estate contained in the will of A. was (by sect. 24) to be taken as if it had been executed immediately before the death of A., and was (by sect. 27) a good execution of the power given to the survivor of A. and B. (*Thomas v. Jones*, 2 J. & H. 475, 1 D. J. & S. 63). Compare the notes to sect. 8, *ante*, p. 9, and to sect. 27, *post*, p. 49.

Leaseholds.

A specific gift of leaseholds for all the residue of the term therein of the testator was held to pass the fee which was acquired by the testator between the date of his will and the day of his death (*Struthers v. Struthers*, 5 W. R. 809; *Miles v. Miles*, L. R., 1 Eq. 462; *Cox v. Bennett*, 6 Eq. 422). But if the intention to be gathered from the will, taken as a whole, is clearly to deal only with leaseholds, then subsequently-acquired real estate will not pass (*Pierce v. Attorney-General*, *Pierce v. Harrison*, 3 W. R. 612); and a devise to B. of all a testator's freehold estates which he purchased of C. will not include a small piece of leasehold mixed up and held with the freehold, of which leasehold the testator purchased from another person the reversion in fee after the date of the devise (*Emuss v. Smith*, 2 De G. & S. 722; see Sugd. R. P. Stat. 365).

Residuary devise remains specific.

The specific character of a residuary devise is not altered by this section (*Hensman v. Fryer*, L. R., 3 Ch. App. 420; the case is going to the House of Lords).

See also *Wheeler v. Thomas* (7 Jur., N. S. 599), where the will of a testator, who after the date thereof became lunatic, was held to speak as from its date and not from the death of the testator.

See also the notes to ss. 26, 27, 33, *post*.

LAPSED AND VOID DEVISES.

XXV. And be it further enacted, That, unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will (k).

A residuary devise shall include estates comprised in lapsed and void devises.

(k) This section is to be construed on the principle of assimilating a residuary devise of real estate to a like bequest of personalty (*Carter v. Haswell*, 3 Jur., N. S. 788, 5 W. R. 388; *Dady v. Hartridge*, 1 Dr. & S. 236). And see *Hickson v. Wolfe* (7 Ir. Ch. Rep. 452, 9 Ir. Ch. Rep. 144); Sugd. R. P. Stat. 373. But the Act does not alter the specific nature of a residuary devise; *ante*, p. 46.

On what principle section 25 is to be construed.

Where estate X. was devised to B. in fee, and there was a residuary devise of "all my freehold hereditaments not hereinbefore devised," to the same person, B., for life, with remainders over, and B. died in testator's life-time, the residuary devise was held to include estate X. (*Green v. Dunn*, 20 Be. 6); and a devise of "all other real estate of which I may die possessed," is a residuary devise within this section, and will include an estate comprised in a specific devise which has lapsed on account of the death of the specific devisee in the testator's life-time (*Cogswell v. Armstrong*, 2 K. & J. 229); see also *Bernard v. Minshull* (Joh. 276), the case of a married woman having a testamentary power of appointment. And where, by mistake, there was a specific devise to uses which, being non-existent, were incapable of taking effect, the specifically devised estate was held to be included in the residuary devise (*Culsha v. Cheese*, 7 Ha. 236; see Sugd. R. P. Stat. 373); and the decision was the same in the case of a void trust in favour of a charity (*Carter v. Haswell*, *ubi sup.*)

From the above cases it will be seen that the words "not hereinbefore devised," "all other my estates," were held not to be sufficient evidence of the "contrary intention" required by this section; and that the intended devise in *Culsha v. Cheese* to uses which the testator erroneously supposed to be in existence, and the intended devise to charitable purposes in *Carter v. Haswell*, were also held to be insufficient evidence of contrary intention. See further as to the construction to be put upon the words "not hereinbefore disposed of," *Earl of Hardwicke v. Douglas* (7 C. & F. 795); *Gale v. Gale* (21 Be. 349, *ante*, p. 42); and see *Davis v. Bennet* (30 Be. 226).

Evidence of contrary intention.

But where a married woman, having a general power to appoint by will estates A. and B., devised estate A. to her husband for life, and subject thereto to trustees upon the trusts after mentioned, and then devised "all other the hereditaments comprised in the settlement not hereinbefore dis-

Exercise of power of appointment by married woman.

GENERAL DEVISE—COPYHOLDS, LEASEHOLDS.

A general devise of lands shall include copyhold and leasehold as well as freehold lands.

XXVI. And be it further enacted, That a devise of the land of the testator, or of the land of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe a customary, copyhold or leasehold estate, if the testator had no freehold estate which could be described by it, shall be construed to include the customary, copyhold and leasehold estates of the testator, or his customary, copyhold and leasehold estates, or any of them, to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will (*l*).

GENERAL DEVISE—APPOINTMENT.

A general gift shall include estates over which the testator has a general power of appointment.

XXVII. And be it further enacted, That a general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate or any real estate

posed of" to another person, the trusts of estate A. being to sell, pay certain legacies, and dispose of the residue for charitable purposes; the devise of "all other the hereditaments, &c.," was held to be specific, and the void gifts to the charities did not pass, but devolved as in default of appointment (*Re Brown*, 1 K. & J. 522; but see *Re Spooner's Trust*, *post*, p. 50).

Legacies to creditors, lapse.

A direction by will to pay the testator's just debts, including the debts not paid in full proved under a commission of bankruptcy, was held to be a bounty, not only in favour of the creditors who survived the testator, but also of the representatives of those who pre-deceased him, and there was no lapse (*Turner v. Martin*, 7 D. M. & G. 429).

Wilson v. Eden.
Leaseholds.

(*l*) Where in the same will there was a gift of all the testator's personal estate to A., and a devise of all his manors, messuages, lands, tenements and hereditaments in the counties of York and Durham, and all other his real estates, to B. and C. and their heirs, to uses, it was held (in opposition to the judgment of Lord *Langdale*, M. R., 11 Be. 237) by the Court of Exchequer (*Wilson v. Eden*, 5 Exch. 752), and the Court of Queen's Bench (18 Q. B. 474), and by Sir *John Romilly*, M. R. (16 Be. 153), that the testator's leaseholds for years passed to B. and C. along with the real estate, and not to A. as part of the personal estate. But where the word "freehold" is prefixed to a similar general description, the leasehold will not pass (*Stone v. Greening*, 13 Sim. 390). A devise of "all my property, whether freehold or personal and wheresoever situate," will pass copyholds (*Reeves v. Baker*, 18 Be. 372).

to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will (*m*).

(*m*) Under the new law it is absolutely necessary to show a "contrary intention" to exclude the exercise of a general power by a general devise, whilst under the old law it was needful to show the intention to exercise the power; the appointees are therefore in a more favourable position under the new than under the old law (*Lake v. Currie*, 2 D. M. & G. 548; *Walker v. Banks*, 25 L. T. 267). There is no "contrary intention" within the meaning of the statute, unless the will contains something inconsistent with the view that the general devise or bequest was meant as an execution of the power (*Seriven v. Sandom*, 2 J. & H. 743). And to exclude the application of the 27th section, the "contrary intention" must have a continuing operation down to the death of the testator; the will must be taken as if executed immediately before the death, and when so taken must show on the face of it an intention of depriving the general devise of the effect given to it by the statute (*Thomas v. Jones*, 1 D. J. & S. 63, 83, *per* Lord Chancellor *Westbury*). As to what is sufficient evidence of a contrary intention, see *Pettinger v. Ambler* (L. R., 1 Eq. 510).

Contrast between old and new law, as to exercise of general power.

A power may be exercised by a will bearing date before the instrument which creates the power, if that instrument come into operation in the testator's lifetime (*Stillman v. Weedon*, 16 Sim. 26; *Cofield v. Pollard*, 5 W. R. 774; *Patch v. Shore*, 2 Dr. & S. 589). But the 27th section applies only to powers actually created at the death of the testator, and does not enable a testator to execute an inchoate power of which he was the intended donee under the will of a person who survives him (*Jones v. Southall*, 32 Be. 31). In that case the intending donor of the power was a lady who had gone through the ceremony of marriage with her deceased sister's husband, and her will purported to be made under a power created by a settlement executed prior to the void marriage; the will was held to be operative (*Southall v. Jones*, 1 Sw. & Tr. 298, 30 Be. 187).

As to date of instrument exercising a power.

A power in a marriage settlement to appoint to all and every "person or persons, child or children," is a general power (*Cofield v. Pollard*, *ubi supra*).

General powers of appointment.

Under a settlement a testator had a power of appointment over estate B.,

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General
powers.

but no such power over estate A. By his will he confirmed the settlement, and devised generally all his real estate to uses different from those of the settlement. It was held that the will exercised the power and passed estate B., and that the confirmation of the settlement had reference to estate A. (*Lake v. Currie*, 2 D. M. & G. 536). And where a testator, who under a settlement had a general power of appointment over certain leaseholds, made, for purposes different from those of the settlement, a general bequest, subject (as to such of his property as was comprised in the settlement) to that settlement which he thereby confirmed in all respects, this was held to be an exercise of the general power, notwithstanding the words confirming the settlement (*Hutchins v. Osborne*, 3 De G. & J. 142).

A testatrix (a widow) in the exercise of a power created by the will of S., appointed a sum of stock to Joseph and John and her other children equally; she appointed all the rest of the property coming to her under the will of S. to her children living at her death equally, and she constituted Joseph "her residuary legatee;" John died before her. It was held that the general residuary appointment passed John's share to Joseph (*Re Spooner's Trust*, 2 Sim., N. S. 129; but see *Re Brown*, 1 K. & J. 528; and *ante*, p. 48). See also *Bush v. Cowan*, 32 Be. 228; 4 Dav. Conv. by Waley, 238, n. (k).

This section is applicable to married women having testamentary powers of appointment exerciseable during coverture equally with persons *sui juris*, and so it would seem are the 10th and other sections of the Act (*Bernard v. Minshull*, Joh. 276).

A testatrix having a general power to appoint 10,000*l.* secured by a term of years in freehold estates, and having also a general power of appointment over the estates so charged, by her will devised all her lands to A. for life, remainder to B. in tail, and she gave the residue of her personal estate to A.; it was held that the 10,000*l.* passed under the residuary gift of the personalty (*Clifford v. Clifford*, 9 Ha. 675).

In *Hawthorn v. Shedden* (3 S. & G. 293), general pecuniary legacies were held to be payable out of personal estate over which the testatrix had a general power of appointment, although in her will no particular fund was indicated; the assets of the testatrix not comprised in the power, being insufficient to pay the legacies. See Sugd. Pow. 310; *Wilday v. Barnett* (L. R., 6 Eq. 193).

A married woman having a general power over personalty worth a little more than 2,600*l.*, to the interest of which she was entitled for life, and having no other property except a reversionary interest contingent on her surviving her mother (which did not happen), gave 2,600*l.* to her husband, and this was held to be a good exercise of the power independently of the statute (*Shelford v. Acland*, 23 Be. 10); and the bequest by a married woman of "the property which she might be possessed of or entitled to at her decease," was held to pass personal property over which she had only a general power of appointment (*Franchcombe v. Hayward*,

FEE-SIMPLE WITHOUT WORDS OF LIMITATION.

XXVIII. And be it further enacted, That where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee-simple, or other the whole estate or interest which the testator had power

A devise without any words of limitation to pass the fee.

9 Jur. 344). That no reference to a general power is necessary in an instrument containing a general gift or devise, see further *Harrington v. Harrington* (13 Sim. 318); *Walker v. Banks* (25 L. T. 267).

General powers.

See further *Chamberlain v. Hutchinson* (22 Be. 444); *Attorney-General v. Brackenbury* (1 H. & C. 782); *Eccles v. Cheyne*, note to s. 33, post, p. 56; *Lefevre v. Freeland* (24 Be. 403).

The 27th section does not apply to special or particular powers; see *Re Caplin* (6 N. R. 17); *Russell v. Russell* (12 Ir. Ch. Rep. 377). Thus, a married woman had special powers over two sums amounting together to 8,000*l.*; she was also entitled to a contingent reversionary interest, and to a sum less than 100*l.* as the apportioned part of her separate income. Her will, purporting to dispose of all her present and future property and income, but not referring to any power, was held not to be an exercise of her above-named special powers, and to be operative only on the sum less than the 100*l.* (*Evans v. Evans*, 23 Be. 1). And where a father had power to appoint certain personalty amongst his children, his will, devising and bequeathing in general terms all his real and personal estate to a child, one of the objects of the power, was held to be inoperative as to such personalty (*Cloves v. Andry*, 12 Be. 604; see also *Moss v. Harter*, 2 S. & G. 458; *Elliott v. Elliott*, 15 Sim. 321).

Special powers, s. 27 does not apply to.

A testator, having power to charge an estate with 500*l.* in favour of his younger children, and to limit a term for securing that sum, devised the estate, subject to legacies to his younger children to the amount of 500*l.*, but without limiting any term, and without referring to his power; it was held that by the will the estate was well charged with the 500*l.* (*Davies v. Davies*, 7 W. R. 85).

Special power; exercise of, in particular case.

A general bequest by will in which the word "appoint" occurred was held to exercise a special power of appointing amongst children (*Pidgeley v. Pidgeley*, 1 Col. 255). *Sed qu.*

A power of revocation is not exercised by an instrument of appointment referring generally to and expressed to be in exercise of every power enabling the appointor, provided there be other property to which the appointment can apply (*Pomfret v. Perring*, 5 D. M. & G. 775).

Power of revocation, exercise of.

And a general revocatory clause in the will of 1855 of a married woman, as that clause was in general terms, not referring to the power or the subject of the power, did not revoke a prior will of 1846, made in exercise of the married woman's general power (*Re Merritt*, 1 Sw. & Tr. 112; 32 L. T. 78).

See also, on the 27th section, *Hawkins, Constr. Wills*, 27.

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to dispose of by will in such real estate, unless a contrary intention shall appear by the will (n).

WORDS IMPORTING FAILURE OF ISSUE.

Words importing failure of

XXIX. And be it further enacted, That in any devise or bequest of real or personal estate the words "die without issue,"

Sect. 28 does not apply to estates originally created by will.

(n) This section does not apply to an estate or interest originally created by the will, *e. g.*, an annuity, a gift of which without words of limitation is held, as it would have been before the statute (*Yates v. Maddan*, 3 M. & G. 532; *Lett v. Randall*, 3 S. & G. 83, affirmed, 9 W. R. 130) to be a gift for life only, though the annuity is charged on real estate (*Nichols v. Hawkes*, 10 Ha. 342). See also *Reay v. Rawlinson* (29 Be. 88).

A devise of freeholds to "A. to be kept in trust for B.; that is, A. is to let the premises, and give the rent to my son B., for his support," passed the freehold to B. absolutely (*Malcolmson v. Malcolmson*, 17 L. T. 44; see also ss. 30, 31, *post*, pp. 54, 55).

Gift of income, construction of, in a particular case.

Though generally a gift of the income of a fund carries the corpus as well as the income (*Clough v. Wynne*, 2 Mad. 188; *Humphrey v. Humphrey*, 1 Sim., N. S. 536), it was held by the Lords Justices (*Knight Bruce*, L. J., *dub.*) that, under a bequest of a residue upon trust to pay the dividends of 1,500*l.* stock to A. for life, and after her death to divide the dividends "equally between B. & C., and the survivor of them," the survivor took only a life interest (*Blann v. Bell*, 2 D. M. & G. 775). See also *Wetherell v. Wetherell* (4 Gif. 51; 1 D. J. & S. 134).

Devise without words of limitation.

The presence of words of inheritance in other parts of a will does not, with reference to a particular devise from which such words are absent, manifest such a "contrary intention" within the meaning of this section, as to cut down the particular devise to an estate for life (*Wisden v. Wisden*, 2 S. & G. 396, 405).

The section does not apply to a devise with any words of limitation, which, if inserted, must operate by their own force. It is immaterial whether the devise is of an estate vested in the testator, or is in execution of a power vested in him. And the Act is equally applicable to a power created by will, and would, just as in a devise of an estate, supply words of limitation so as to enable the donee of the power to appoint the fee simple (*Sugd. R. P. Stat.* 382).

It has not yet been decided whether this section would apply to a case where, after a devise without words of limitation, there is a devise over also without words of limitation. Lord *St. Leonards* is of opinion that such cases were not within the purview of the Act, and that it would be dangerous to extend it to them (*Sugd. R. P. Stat.* 382).

See also *Brook v. Brook* (3 S. & G. 280); and as to charges upon devised estate, see *Clifford v. Clifford*, note to sect. 27, *ante*, p. 50; and *Tucker v. Loveridge* (2 De G. & J. 650).

or "die without leaving issue," or "have no issue," or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise: Provided, that this Act shall not extend to cases where such words as aforesaid import, if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue (o).

Sect. 29.

issue to
mean issue
living at the
death.

Proviso.

(o) The object of this section is to remedy the inconvenience arising from the words "dying without issue," and similar words, having acquired a legal meaning different from the popular meaning (*Greenway v. Greenway*, 1 Gif. 131). And mere presumption of intention is insufficient to exclude the operation of this section (*Ex parte Bate*, 1 N. R. 470).

Dying with-
out issue.

In a devise or bequest to A., but if A. die in the lifetime of B. without leaving issue, then over, the words "without leaving issue" refer to the time of the death of B., and notwithstanding that A. left issue living at his death, the gift over will take effect, if all the issue of A. die in the lifetime of B. (*Jarman v. Vye*, L. R., 2 Eq. 784).

The section, however, has no application to cases in which the words "dying without issue" are combined with other words, such as "dying under twenty-one;" and a devise to A., with a limitation over on his dying without issue, "or" under twenty-one, was held ("or" being read "and") to give A. the fee on his attaining twenty-one (*Morris v. Morris*, 17 Be. 198); nor does the section apply to cases in which there are express limitations to "the heirs of the bodies" of the first takers (*Green v. Green*, 3 De G. & S. 480). See also *Re Sallery* (11 Ir. Ch. Rep. 236). But in *Greenway v. Greenway* (*ubi sup.*), where a testator gave his real and personal estate to trustees in trust, as to the annual income, for his two brothers, or the heirs of their bodies; and if either should die, leaving heirs of his body, his share should go to such heirs; but if one should die without issue, then the whole income should go to the survivor, or in case of his death, to his heirs; but in case both should die without issue, then the whole property to be divided amongst the testator's next of kin; it was held by *Stuart, V.-C.*, that the gift over of the personalty was valid, and was not too remote as depending on an indefinite failure of issue. See the case, on appeal, 2 D. F. & J. 128.

Words im-
porting
failure of
issue.

ESTATE OF TRUSTEES.

A devise to trustees or executors shall (with certain exceptions) pass the fee or other the whole interest of testator.

XXX. And be it further enacted, That where any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication (*p*).

Dying without issue.

Under a bequest of personalty to John and James equally, and if John shall die without issue, the property bequeathed to him shall revert to the sons of James; it was held that John did not take the absolute interest in a moiety (*In re O'Bierne*, 1 J. & L. 352).

See also *Mathews v. Gardiner* (17 Be. 254); *Re Allen's Estate* (3 Drew. 382); *Harris v. Davis* (1 Col. 424); H. Sugd. Wills, 96—107; Sugd. R. P. Stat. 383—388; Hawkins, Constr. Wills, 214.

Devises to trustees, pass the fee, when.

(*p*) See *Malcolmson v. Malcolmson* (17 L. T. 44); *Spence v. Spence* (12 C. B., N. S. 199; 10 W. R. 605).

Sects. 30, 31, compared.

With respect to this and the following section, it has been said, that "the general result of the two consecutive provisions seems to be, first, that a devise to a person upon *any* trust, or to an executor as such, either indefinitely, or for any estate (except an estate of freehold, express or implied, or a definite term), will give the fee, or other the whole interest, *notwithstanding* any indication of a contrary intention; and, secondly, that a devise to a person, without such a limitation of his estate as would exclude all constructive modification, upon any trust or trusts, either not being or not including a trust to continue for life (which ingredient, by letting in the implication of an estate for life, would bring the case within the previous provision), or being or including a trust to continue for life, but capable of outlasting the life, will likewise imperatively give the fee, or other the whole interest" (1 Hayes, Conv. 396). Again, "the 30th and 31st sections of the Wills Act have been described as obscure and even conflicting: their meaning, however, will be apprehended by observing, that the 30th section, which speaks of a devise passing, 'the fee simple or other the whole *estate or interest* of the testator,' relates to the quantity of estate to be taken by a trustee for the purposes of the trust; while the 31st section, which declares that a devise shall vest in trustees, 'the fee simple or other the whole *legal estate*' in the premises devised, relates to the disposition of the legal estate not required for the purposes of the trust. The 30th section enacts, that in no case shall trustees or executors be held, for the purposes of the trust, to take an indefinite term of years; the 31st section enacts, that where the estate of the trustees is not expressly limited, they shall in all cases take either an estate determinable on the life of a person

ESTATE OF TRUSTEES.

XXXI. And be it further enacted, That where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple, or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied (*q*).

Trustees under an unlimited devise, where trust may endure beyond the life of a person beneficially entitled for life, to take the fee.

taking a beneficial life interest in the property, or the absolute *legal* estate in fee simple" (Hawkins, Constr. Wills, 156).

See also Sweet, Wills, 153—155; Sugd. R. P. Stat. 389, *et seq*.

(*q*) The effect of this section has been explained as follows:—"The 31st section seems to have been chiefly aimed at the doctrine, now abandoned, of a determinable fee. Its operation, in other respects, will be as follows,—1st. The ordinary case of a devise to trustees in trust to pay the rents and profits to A. for life, and after his decease in trust for B. and his heirs, is left unaltered: the legal estate will still vest in B. after the death of A. So, in the case of a devise to A. for life, with remainder to trustees and their heirs in trust to preserve contingent remainders, with remainder to the first and other sons of A. in tail, with vested remainders over: the estate of the trustees to preserve will still be restricted by implication to the life of A. 2ndly. Trusts to pay annuities will be altered. A devise to trustees in trust to pay an annuity to A. for life, and subject thereto in trust for B., will now vest in the trustees the whole legal fee simple, and not an estate during the life of the annuitant, although the annuity be payable out of the *annual* rents and profits only. 3rdly. Trusts during minority will present a difference. If the devise be to trustees in trust to apply the rents and profits for the maintenance of A. during his minority, and when A. attains twenty-one in trust for A. *during his life*, with remainders over, the legal estate will still as before vest in A. on his attaining twenty-one, inasmuch as the beneficial interest is given to him for life, and the purposes of the trust cannot continue longer. But if the devise be (after the trust during minority) in trust for A. on his attaining twenty-one, *in fee* or in tail, and not for life only, the section will apply, and the whole legal estate will remain in the trustees, so that the estate of A. will be equitable only. It may be a question whether, if the trusts declared are to pay the rents and profits to *several* persons (not to one only) successively for life, with remainders over, the legal estate will vest

Effect of sect. 31.

Devise in trust to pay rents to A. for life, with remainder in trust for B.

Devise to trustees to preserve contingent remainders.

Devise in trust to pay an annuity.

Devise in trust to apply rents during minority.

Devise in trust to pay rents to several per-

Sect. 32.

LAPSE OF ESTATE TAIL.

Devises of
estates tail
shall not
lapse, when.

XXXII. And be it further enacted, That where any person to whom any real estate shall be devised for an estate tail or an estate in quasi entail shall die in the lifetime of the testator, leaving issue who would be inheritable under such entail, and any such issue shall be living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will (*r*).

LAPSE—CHILDREN OR ISSUE DYING IN TESTATOR'S LIFETIME.

Gifts to chil-
dren or other
issue of tes-
tator who
leave issue
living at the
testator's
death shall
not lapse.

XXXIII. And be it further enacted, That where any person, being a child or other issue of the testator, to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will (*s*).

sons succes-
sively for
life.
Sect. 31 ap-
plies to every
case where
no express
limitation of
trustee's
estate.

in the trustees in fee simple or for the lives of the respective persons taking beneficial life interests. The section appears to apply to every case where there is no *express* limitation of the estate to be taken by the trustee, although the gifts over to the persons beneficially entitled may be in the form of a *direct devise* to them. Thus, if the gift be—'I devise Whiteacre to A. and his heirs, in trust to apply the rents and profits during the minority of B. for his benefit, and when B. attains twenty-one, I devise Whiteacre to B.,' it would appear that the trustees must, notwithstanding the latter words, take the fee by force of the 31st section" (Hawkins, Constr. Wills, 156—158).

(*r*) See Sugd. R. P. Stat. 391.

Sect. 33
inapplicable
to special,
applicable to
general
powers of
appointment.

(*s*) The provisions of this section against lapse, though inapplicable to the exercise of a special power of appointment by will (*Griffiths v. Gale*, 12 Sim. 327, 354), are applicable to the exercise of a general power of appointment by will (*Eccles v. Cheyne*, 2 K. & J. 676). And see *Freeland v. Pearson* (L. R., 3 Eq. 663).

Issue not
substituted,
but subject-
matter be-

This section does not substitute, for the deceased intended taker, his or her issue, but makes the subject of the gift or devise the absolute property of the intended taker, and, as such, comprised within the dispositions of

WHEN ACT OPERATES.

XXXIV. And be it further enacted, That this Act shall not extend to any will made before the first day of January, one thousand eight hundred and thirty-eight, and that every will

Act not to extend to wills made before 1838 nor to

his will, notwithstanding he died before the testator (*Johnson v. Johnson*, 3 Ha. 157; 1 Hayes, Conv. 406), or descendible to his next of kin or heir at law (*Wisden v. Wisden*, 2 S. & G. 396; *Skinner v. Ogle*, 1 Rob. 363; 9 Jur. 432). And the fiction of supposing the child to have survived the testator is not to be extended further than is necessary to prevent lapse: thus property bequeathed by a testator to his daughter, who died in his lifetime, but whose child and husband survived him, is not within a covenant to settle property coming to the daughter during coverture (*Pearce v. Graham*, 1 N. R. 507; 11 W. R. 415). Probate duty is payable in the same way as if the intended taker had survived the testator (*Perry's Executors v. The Queen*, L. R., 4 Exch. 27).

comes part of estate of intended taker.

It does not appear to have been decided, whether, as to bequests to a child of the testator which are by this section protected from lapse, the will of the child is to be construed as at the death of the child or of the parent; but whichever period be taken, the will of the child must be construed as if the will of the parent were then in existence; see *Re Mason's Will* (34 Be. 494).

A child *en ventre sa mère* would doubtless be issue left by the devisee or legatee within the meaning of this and the previous section.

A doubt arose on the words of this section, "leaving issue, and any such issue of such person shall be living at the time of the death of the testator," whether, to prevent a lapse, it was necessary that the issue of the intended recipient who is alive at the death of the testator should be the same issue who was alive at the death of the intended recipient. It has recently been decided that it is sufficient, to prevent a lapse, that *any* issue should be living at the death of the testator (*Re Parker*, 1 Sw. & Tr. 523; 35 L. T. 447).

The sound construction of this section seems to be, that, if the bequest be made after the Act came into operation, the Act will apply to a case where a child may have died before the will was made, but after the Act came into operation; see *Winter v. Winter* (5 Ha. 306), in which case a testator, who died in 1843, made a devise and bequest in 1833 in favour of his son, who died in 1838 leaving issue, and having made a will dated in 1824; it was held that there was no lapse, the real estate devolving upon the heir of the son, and the personalty upon his executor, although his will was made before the Act came into operation. And a similar decision was given in *Mower v. Orr* (7 Ha. 473), where V.-C. Wigram pointed out the variation between that case and *Wild v. Reynolds* (5 No. Cas. 1), in which the intended taker died *before* the Act came into operation. See

As to dates of the bequest, and the death of the intended taker.

Sect. 34.

estates pur
autre vie of
persons who
died before
1838.

re-executed or republished (*t*) or revived by any codicil shall, for the purposes of this Act, be deemed to have been made at the time at which the same shall be so re-executed, republished or revived; and that this Act shall not extend to any estate pur autre vie of any person who shall die before the first day of January, one thousand eight hundred and thirty-eight (*u*).

also *Wisden v. Wisden* (2 S. & G. 396); *Barkworth v. Young* (4 Drew. 19); *Lowley v. Heath* (27 Be. 535).

Sect. 33
not appli-
cable to gifts
to classes.

This section does not apply to gifts to classes. For example, a bequest to the testator's "children living at his death;" one child, Henry, died leaving issue; it was held that the representatives of Henry took nothing, and that the other children alone were entitled (*Fullford v. Fullford*, 16 Be. 565; see also *Browne v. Hammond*, Joh. 210); and in *Olney v. Bates* (3 Drew. 319), trusts for the issue of deceased children of the testator were held to be substitutionary, and not substantive trusts, and, as to the share intended for a pre-deceasing child of the testator, to fail for the benefit of the members of the class living at the death of the testator. And in *Stewart v. Jones* (3 De G. & J. 532)—where there was a gift by will to testator's children now born, or hereafter to be born, and, as to the share to which each daughter should become entitled, upon trust for her separate use for her life, and after her death for her children; and one of testator's daughters died before him, leaving children—it was held by Lord Chelmsford, C., affirming the decision of *Wood, V.-C.*, that the children of the deceased daughter were not entitled.

(*t*) The word "republished" seems to have crept in by mistake. The section contemplates the re-execution of a will after the Act has come into operation; such re-execution must be performed with the formalities required by sect. 9 (*ante*, p. 9); if these be complied with, publication is unnecessary (see sect. 13, *ante*, p. 28), if not, is of no avail.

Will before
1838, effect of
codicil, or
alterations
executed
after 1837.

(*u*) The statute extends generally to wills made previously to the 1st January, 1838, where alterations, duly executed and attested, have been made in such wills on or subsequently to that day. See *Croker v. Marquis of Hertford* (4 Moo. P. C. 339, 8 Jur. 863); *Hobbs v. Knight* (1 Cur. 768).

The effect of a re-execution of a will by a codicil, if only for the purpose of appointing an executor (*Wilson v. Eden*, 5 Exch. 752, 12 Jur. 488), or of revoking a legacy (*Skinner v. Ogle*, 1 Rob. 363, 9 Jur. 432), is to bring the date of the whole testamentary disposition, so far as the terms of the will permit, down to the date of the codicil; and the result is the same as if the testator at the date of the codicil had made a will in the words of the will so re-executed (*Winter v. Winter*, 5 Ha. 306). See also *Gordon v. Atkinson* (1 De G. & S. 478); *Brooke v. Kent* (3 Moo. P. C. 334, 1 No. Cas. 93). A revoked will of real estate, dated before 1838, is effectually

SCOTLAND.

XXXV. And be it further enacted, That this Act shall not extend to Scotland (x).

Act not to extend to Scotland.

revived by a codicil (expressly referring thereto) executed after 1837, in the presence of two witnesses (*Andrews v. Turner*, 3 Q. B. 177). And a codicil causes a will, in which the words are sufficiently comprehensive for the purpose, to include real estate acquired between the date of the will and the date of the codicil (*Doe v. Walker*, 12 M. & W. 591; *Wilson v. Eden*, *ubi sup.*; *Lady Langdale v. Briggs*, 3 S. & G. 246; 8 D. M. & G. 391).

As to the revocation of a will, dated before 1838, by acts after that date, see *Langford v. Little*, *Walker v. Armstrong*, *ante*, p. 43.

The Act does not require a will to be dated, and, consequently, the mere absence of a date does not invalidate a will (Sugd. R. P. Stat. 329), and parol evidence will be received to assist internal evidence in determining the period of execution of an undated will. If a testator left two wills, both undated, and their relative ages could not be ascertained, both instruments, so far as they were consistent, would be valid, and both, so far as they were inconsistent, would be void. See *Phipps v. Earl of Anglesey* (5 Br. P. 45, 57). Every one is presumed to know the law; therefore a will without any date, well executed according to the old law, but not executed pursuant to the new Act, is presumed to have been executed before the Act came into operation; but the presumption grows less strong as the period increases during which the new Act has been in force. And this presumption of due execution may be rebutted by evidence (*Pechell v. Jenkinson*, 2 Cur. 273), in which case the testator died in 1839. And unattested holograph alterations in a will made before 1838 were, in the absence of evidence, presumed to have been made before 1838 (*Re Streaker*, 28 L. J. 58). But see *Re Jorden* (2 L. T. 335), in which the evidence led to the presumption that an undated codicil of a testator, who died in 1842, was executed after the 1st January, 1838.

A will need not be dated.

Undated wills.

(x) The Wills Act, with a few immaterial variations, was adopted by the Legislative Council of our Indian possessions (Act of Council, 1838, No. 25), as from the 1st February, 1839 (see *Re Foy*, 2 Cur. 329; *Casement v. Fulton*, 5 Moo. P. C. 130); by the Australian colonies, as from the 1st January, 1840 (see New South Wales Colonial Acts, 3 Vict. No. 5, 17 Vict. No. 5; Victoria Colonial Act, 18 Vict. No. 19; South Australia Colonial Act, 5 Vict. No. 16); by Jamaica, as from the 1st January, 1841 (Colonial Acts, 3 Vict. No. 51, 25 Vict. No. 26); and by Grenada, as from the 1st January, 1842 (Laws of Grenada and the Grenadines, No. 99, edited by Snagg). In Upper Canada many of the important provisions of the Statute of Wills were anticipated by the Colonial Act, 4 Will. 4, No. 1; as to Lower Canada, see 14 Geo. 3, c. 83, s. 10, amended by Colonial Act, 41 Geo. 3, No. 4; and the Revised Code of Nova Scotia (passed in 1851)

Adoption of the Wills Act in the colonies.

AMENDMENT.

XXXVI. And be it enacted, That this Act may be amended, altered or repealed by any Act or Acts to be passed in this present session of Parliament (*y*).

embodies the principal provisions of the English Act. As to the Hudson's Bay Company's Settlements, see *Re Sutherland* (4 No. Cas. 563). But such of our colonies as have been conquered or ceded retain for the most part a foreign system of law; see as to the Mauritius, *Re Smith* (2 Rob. 335; 14 Jur. 1100); and as to the Cape of Good Hope, see Appendix.

And, generally, as to the colonial law of wills, see 4 Dav. Conv. (by Waley) 267, (*d*).

(*y*) The Act remains intact with the following exceptions:—

(1.) Section 9 has been amended by 15 & 16 Vict. c. 24 (*ante*, p. 21)—or rather, the section has been explained, and the construction originally placed upon it by the Ecclesiastical Court has been negatived.

(2.) Section 12 has been repealed by 28 & 29 Vict. c. 112; and provision respecting the wills of petty officers and seamen of the Royal Navy and Marines, so far as relates to their wages, prize money, bounty money, or any money or effects in charge of the Admiralty, is now made by 28 & 29 Vict. c. 72; for which see Appendix.

A

PRACTICAL VIEW

OF THE

NEW STATUTE OF WILLS.

—◆—

IN the long struggle to enrol among our civil rights the power of testamentary disposition,—one of the last consummate fruits of a refined policy,—when, as war had pre-occupied the land and superstition bespoken the goods, every point was to be carried against feudal (*a*) or ecclesiastical repugnance, it is not difficult to suppose that a mass of laws would be generated, neither enlightened, comprehensive, nor coherent. The different degrees of dignity and value, naturally attached by our ancestors, in times of chieftainship and violence, to moveable and immoveable property, and again, as regards the soil, to the tenure of the sword and of the plough, to freehold and to leasehold interests (*b*), and the different jurisdictions under which territorial and commercial wealth consequently fell, embarrassed the growth of the much-coveted dominion with numerous distinctions, in themselves artificial and arbitrary, and in their consequences inconvenient, often unjust. Under such various and conflicting influences, both the right of disposing and the forms of disposition were capriciously modified; opposite codes were formed; the law, as respects realty, continued too strict, as respects personalty, grew too lax; and at the period of the recent legislative revision of this interesting branch of our

General condition of the old law.

(*a*) See Barrington, Stat. 502.

(*b*) The feudal law took little account of tenants for years, occupied, as they were, in the baser pursuits of husbandry; and though a large portion of the landed property of the kingdom is now held under leases for years, such leases, except of lands in Scotland, still rank only as personal estate (*Vide post*, p. 64, n.)

jurisprudence, its general characteristics were complication, diversity, uncertainty. To what extent, and with what success, a remedy has been applied, it will be one of our objects to show, in the observations which we are about to offer on the statute (*c*) "For the Amendment of the Laws with respect to Wills."

The testamentary power, how affected by the testator's domicile.

Comparative freedom of the English testamentary law.

But, as we do not address ourselves to the learned reader exclusively, it may be useful to preface our remarks upon the statute, by observing that the validity, construction and effect of testamentary dispositions are determined, as to real property, by the law of the state within which the subject-matter has its fixed existence; but, as to personal estate, which is supposed to accompany our motions, and which really sympathises in our fortunes, by the law of the state within which the testator, at the time of his death, had his domicile or *home* (*d*). Hence, to a greater or a less extent, the self-expatriated Englishman (and for this purpose a permanent residence even in Scotland is expatriation) stands excluded from, among other natal and inestimable rights, the advantages held out by the testamentary laws of his country, which breathe the generous freedom of its other institutions. The chief and peculiar advantage of those laws, which he thus in part renounces, consists in the absolute subjection of all his property, real and personal, to his ultimate volition. The law of England, wisely directing its paternal care to the great family of the state, confided private and particular interests to the dictates of natural and moral feeling and has not repented of its confidence. There have been cases indeed, but such are of rare occurrence, in which, under peculiar circumstances, wills unnaturally injurious to the near relatives of the testator, have been successfully impeached, on the ground of mental delusion (*e*); otherwise, by our law, husbands and parents may leave all their property, without question, to strangers (*f*). This unfettered dominion would, if abused, call

(*c*) 1 Vict. c. 26. The Act was drawn by the late Mr. Tyrrell.

(*d*) See the Appendix, On Domicile.

(*e*) See *Dew v. Clark* (1 Add. 279, 3 Add. 79, 208, 4 Rus. 511, 5 Rus. 163); *Fulleck v. Atkinson* (3 Hag. 527).

(*f*) See *Rawlins v. Goldfrap* (5 Ves. 444), where Lord Eldon said that a man might leave his children without a maintenance, and the parish

for legislative restraint ; but, while discreetly enjoyed, or rather, while suspended over all, even the most natural expectants, it operates more beneficially (*g*) than the jealous code of a neighbouring empire, which, by limiting the testamentary power to a certain proportion (*h*) of the testator's possessions, discourages industry, tends continually to a more and more minute subdivision of capital (*i*), and curtails the means of promoting obedience, gratitude, affection, within the domestic sphere most adorned by the exercise of those virtues. We now proceed to the principal subject of this Dissertation.

The new statute, whether considered as an enabling, a restraining, or an expounding Act, affects the previous scope and construction of testamentary dispositions to an extent which renders the study of its provisions one of the most important duties of every professional man, and some knowledge of their general bearing matter of deep interest to all. They will be found to relate chiefly to the personal ability of the testator ; to the subjects of testamentary disposition ; to the exercise of testamentary powers of appointment ; to the execution and attestation of wills ; to the competency of attesting witnesses ; to the revocation and alteration of wills ; to the doctrine of lapse in particular cases ; and to the construction of wills, in certain respects. In regard to each of these matters, the old testamentary rights are enlarged, abridged, or modified ; but the predominating feature of the statute, and what, indeed, constitutes its chief excellence, is the assimilation, as to some points

In what respects the law is altered by the new statute of wills.

officers would have no remedy against the executor ; and *Ruttinger v. Temple* (4 B. & S. 491).

(*g*) See Barrington, Stat. 503.

(*h*) A Frenchman may bequeath one moiety, if he leave only one legitimate child ; a third part if he leave two ; and a fourth if he leave three or more such children ; the descendants of any child of the testator dying before him being considered as one child. In default of such child, he may bequeath a moiety, if he leave ascendants in the paternal and maternal lines, or three-fourths, if he leave ascendants in only one of those lines. If he leave no ascendants or descendants, then he can dispose of the whole (Cod. Nap. liv. 3, tit. 2, ch. 3 ; 1 Hayes, Conv. 590, *et seq.*)

French law of succession.

(*i*) But see J. S. Mill, Polit. Econ., vol. 1, pp. 267—277, and Appendix ; vol. 2, pp. 472—483.

of general importance, of the law of real and the law of personal estate (*h*). This has been effected, for the most part, by allowing an ampler testamentary dominion over the former; though at the cost, in some respects, of privileges (not to be lightly estimated in a free country) before peculiar to the latter. The intention of the unlearned testator is no longer liable to be frustrated by the feudal laws of tenure; the same positive law now regulates the will of realty and the testament of personalty; that law, amended and compressed within one statute of moderate dimensions, may henceforth be consulted, with comparative facility, by all; and the difficulties are reduced, in a great measure, to those which attend the exposition of all written documents, and which, as they sometimes present themselves even in perusing the Act itself, cannot but fall largely to the share of a man's last will and testament;—an instrument vainly imagined to possess, whether from long judicial indulgence, or from some peculiar sanctity of character (*l*), the virtue of conveying the clearest ideas in the loosest language.

Repeal of the
old statute
law.

The whole mass of former enactments respecting wills is repealed in the outset (*m*), and the statute then proceeds to

Terms "per-
sonal estate,"
&c. defined.

(*h*) The term "personal estate," as used in the text, generally includes leaseholds for years, technically called chattels real, as well as money, goods, &c., technically called chattels personal; and the term "real estate," as there used, includes almost all interests, not being leases for years, in land of every tenure. But where the real and personal estate are to go in different ways, care must be taken in the wording of general devises or bequests, to avoid any question on the operation of section 26 of the Act (see *Wilson v. Eden*, *ante*, p. 48). Leaseholds, for the purposes of the Succession Duty Act (16 & 17 Vict. c. 51), are deemed real property, and chargeable as such with the succession duty (ss. 1, 19). In the strictest technical sense the terms "will" and "devise" are appropriated to real estate; and the terms "testament," "bequest," and "legacy," are appropriated to personal estate; but the terms "will," "testator," and "testamentary," are commonly used, as in the text, with reference to either species of property. "Will" and "last will" are synonymous, for a will becomes operative as a will only on the death of the testator (*Lord Walpole v. Earl of Cholmondeley*, 7 T. R. 138).

Leaseholds
for years.

(*l*) Wills are said to be entitled to a liberal construction for the benefit of the soul of the testator, "Car le volunt de chescun home serra prise ou construe en le plus large manner que il poet estre raisonablement pur le benefit de le alme de le mort" (T. 17 Henry 7; Kei. 44 b).

(*m*) Sect. 2. See Appendix.

build up, partly on the old foundations and with the old materials, but with unequal skill, what must long form the great institute of testamentary law.

I. The old distinction in regard to the qualifying age, between wills of real, and testaments of personal estate, and again, as to the latter, between the sexes—a distinction which denied to all persons under twenty-one the power of devising real estate unless by special custom (*n*), but permitted boys (*o*) of fourteen, and girls of twelve, to bequeath any amount of personal estate—is abolished.

I. AS TO THE
TESTATOR'S
PERSONAL
ABILITY.

The statute requires that every testator shall be of the age of twenty-one years (*p*); nor can this enactment be evaded by creating an express power to appoint notwithstanding minority (*q*), or by any other means. Married women are under the same disability to make a will as before the statute (*r*), with the addition that they must now in all cases have attained 21 that their wills may be valid.

Minors dis-
qualified by
the statute.

Here we may be allowed to make a digression for the purpose of presenting the reader with a summary of the law, as it now stands, in regard to testamentary capacity. The persons, then, incapable, wholly or partially, of making a will, are—1. Minors without any exception or qualification whatever (*s*). 2. Married women, except for the special purpose of appointing an executor to continue the personal representation of a testator (*t*) of whose will the feme is herself the sole or the surviving executrix, unless enabled by a power (*u*), which some previous settlement or will not unfrequently confers, or possessed of personal property settled to the se-

Summary of
the existing
law, as re-
gards per-
sonal ability
to dispose by
will.

Minors.

Married wo-
men.

(*n*) 2 And. 12.

(*o*) 1 Wms. Exors. pt. 1, bk. 2, ch. 1, s. 1.

(*p*) Sect. 7; but see *ante*, pp. 9, 25.

(*q*) Sugd. Pow. 178, 910.

(*r*) Sect. 8, *ante*, p. 9. (See 34 & 35 Hen. 8, c. 5, s. 14.)

(*s*) But see *ante*, pp. 9, 25, as to the will of a soldier in active service, or seaman at sea.

(*t*) Shep. Touch. 402; *Re Bayne*, 1 Sw. & Tr. 132, a case upon a limited probate of the will of a married woman who was an executrix; and see *Re Herbert's Will*, 8 W. R. 272.

(*u*) Sugd. Pow. ch. 5, s. 1, pp. 152—177.

W.

F

Persons of
unsound
mind.

parate (*x*) use of the wife; or, unless the husband be banished by Act of Parliament, or have abjured the realm, when the wife's capacity revives (*y*); for although it is true that a married woman may, with the assent of her husband, make a valid testamentary disposition of personal estate (*z*) not settled to her separate use, yet, as such disposition really derives its effect from his sanction, and is not the result of her independent volition, it is not, properly speaking, her *will*. 3. Persons not of a sound disposing mind (*a*), whether from idiocy (*b*), insanity (*c*), lunacy—unless the testamentary act be the fruit of a

(*x*) As to separate estate in realty in the absence of a power, see note to Prec. IX., *post*.

(*y*) *Countess of Portland v. Prodders*, 2 Ver. 104; *Ex parte Franks*, 1 Moo. & S. 11; *Re Martin*, 2 Rob. 405; and see *post*, note to Prec. IX.

(*z*) *Hearle v. Greenbank*, 1 Ves. s. 298, 1 Rob. 364; *Mariot v. Kinsman*, Cro. Car. 219; *Duke of Marlborough v. Lord Godolphin*, 2 Ves. s. 75; *Re Smith*, 1 Sw. & Tr. 127.

(*a*) See 34 & 35 Hen. 8, c. 5, s. 14,

(*b*) *Dyer*, 143 b.

Competency
of testator.

(*c*) The presumption that every man is sane until the contrary is proved, is a mixed presumption of law and fact. The competency of a testator is to be assumed until it is impeached by evidence; but it is not to be assumed as a matter of law, that a will is made by a competent testator, but the court or jury must be convinced of the competency. Therefore, he who relies upon a will in opposition to the heir-at-law, must produce evidence that the testator was a person of sound and disposing mind; and when such evidence has been produced, it is incumbent on the party alleging the testator's incompetency, to prove that the incompetency existed (*Sutton v. Sadler*, 5 W. R. 880).

Insanity.

Where a commission in lunacy has issued, and a jury has found that the subject of the commission is of unsound mind, the presumption of law, in favour of parties to the commission (but not as to third parties, *Snook v. Watts*, 11 Be. 105), is that the verdict is well founded, and, if the commission be not superseded, that the party continues a lunatic down to his death. Thus a will made by a person who had been found lunatic by inquisition, but who had recovered his sanity before his death, was pronounced against (*Grimani v. Draper*, 6 No. Cas. 418), in which case the commission was not superseded. But this presumption of law may be rebutted by positive evidence of entire or partial recovery (*ib.*; *Cooke v. Cholmondeley*, 2 M. & G. 22; *The E. I. Co. and Prinsep v. Dyce Sombre*, 10 Moo. P. C. 232, D. & Sw. 22, 4 W. R. 714); though, of course, when a will is set up, made by a testator during the subsistence of a commission of lunacy against him, the *onus probandi* lies upon the party propounding the will

to establish the complete or temporary recovery of the lunatic, at the times of giving instructions for and executing his will (*ib.*) In *Dimes v. Dimes* (10 Moo. P. C. 422), a will made by a testator of fluctuating capacity was found to have been made in a lucid interval, and was held good. And in *Nichols v. Binns* (1 Sw. & Tr. 239), where the testator had for years been habitually insane, but with intermissions, and the will was actually executed in a lunatic asylum, the jury having found that it was executed in a lucid interval, probate was decreed. In that case the instructions for the will were designed and written by the testator himself, without assistance, and the will made a natural and equitable disposition of his property; which latter fact was held to be, though not conclusive, strong evidence of the instrument having been made in a lucid interval. Again, in *Symes v. Green* (1 Sw. & Tr. 401, 5 Jur., N. S. 742), it was held that if a will, rational on the face of it, is shown to be duly executed, the presumption is, that it was made by a person of competent understanding; the testator in that case was subject to insane delusions, the will was in his handwriting, perfectly rational, and in no way connected with or referring to the subject of the delusions; but the circumstances in evidence counterbalanced the presumption of competency, and the decree was against the will. *Waring v. Waring* (6 Moo. P. C. 341, 6 No. Cas. 388, 12 Jur. 947) is an important case, in which also the testatrix was subject to delusions, and had been found insane by inquisition, but subsequently to the execution of her will: that document, on the face of it, betrayed no marks of insanity, but it was pronounced against by the Privy Council, in affirmation of the court below: in delivering the judgment of the Judicial Committee, Lord Brougham entered at length into an exposition of the legal doctrine of monomania. See also *Greenwood v. Greenwood* (3 Cur. App. i.); *Fowlis v. Davidson* (6 No. Cas. 461); both of which contain clear and lucid expositions of the legal principles applicable to cases of monomania; *Johnson v. Blane* (6 No. Cas. 442), where the testatrix was considered by her medical attendant to have recovered from her delusions, and the will was a rational one, but it was pronounced against, on the ground *deficit probatio*; and *Smith v. Tebbitt* (L. R., 1 Prob. 398), where the tests of mental disease are considered.

Lucid interval.

Monomania.

Mere eccentricity must not be confounded with insanity or monomania; see *Dew v. Clarke* (3 Add. 97). See also J. S. Mill, On Liberty, ch. 3, p. 123, n. In *Freer v. Peacocke* (1 Rob. 442, 11 Jur. 247), it was held that moral insanity, or a moral perversion of the feelings, unaccompanied with delusion, is insufficient to invalidate a will; the eccentricity of the testator must be resolved into intellectual insanity. See also on the question of capacity with reference to the distinction between eccentricity and insanity, *Goddard v. Vere* (4 No. Cas. Supp. ix.) In that case the will was pronounced against, but a later will of the same testator was afterwards propounded, and pronounced for (*Wellesley v. Vere*, 1 No. Cas. 240). And in *Austen v. Graham* (8 Moo. P. C. 493), and *Mudway v.*

Eccentricity not to be confounded with insanity.

Croft (1 L. T. 479), decrees were pronounced in favour of the eccentric wills of eccentric testators.

Imbecility
and doubtful
capacity.

In cases of imbecility, and weak or doubtful capacity, it seems impossible to lay down any general rule; the question is always one of degree, and of that question the particular circumstances in each instance must dispose. In *Bannatyne v. Bannatyne* (2 Rob. 472), a will made by an imbecile person was supported, as made in an interval of regained capacity. And in *Deare v. Elwyn* (1 No. Cas. 342), where the evidence as to capacity was conflicting, and that of the drawer of the will open to suspicion, the Privy Council affirmed the decision of the Prerogative Court, and pronounced for the will. But in *Mitchell v. Thomas* (6 Moo. P. C. 137), another case of doubtful capacity, where the will was in favour of the drawer, the decision was against the will; as it was also in *Wallis v. Maughan* (1 No. Cas. 534), where the testator was of weak intellect, and the will was prepared by the attorney of one of the interested persons from the instructions of the latter, and without seeing the testator. See also *Harwood v. Baker* (3 Moo. P. C. 282), a case in which the will was in favour of the testator's wife, to the exclusion of other members of his family.

Undue in-
fluence.

Closely, and almost inseparably, connected with questions of imbecility and doubtful capacity, are those of undue influence. In order to set aside on this ground the will of a person of testamentary capacity, it must be shown that the circumstances under which the will was executed are inconsistent with any hypothesis but that of undue influence; the exercise of undue influence cannot be presumed, it must be proved to have been exercised, and exercised, moreover, in relation to the will itself, and not merely to other transactions (*Boys v. Rossborough*, 6 H. L. C. 2, 49, 51). Undue influence, in a popular sense, may exist in the form of bad companionship and bad example, but this is not sufficient to invalidate a will made under its operation. In order to be undue within the meaning of any rule of law which would make it sufficient to vitiate a will, it must be an influence exercised either by coercion or by fraud (*ib.* 48); allowing a fair latitude in the interpretation of those terms: thus actual violence is not necessary to constitute coercion, but imaginary terrors may be sufficient to deprive the testator of free agency; and contrivances producing false impressions may be equivalent to positive fraud (*ib.* 49). Persuasion is not unlawful, but pressure which overpowers the volition, without convincing the judgment, constitutes undue influence, though force be neither used nor threatened (*Hall v. Hall*, L. R., 1 Prob. 481). The fact of a testator retaining his mental capacity, and for a considerable time surviving the date of, without altering or throwing doubt upon his will, is an important circumstance in favour of its validity (*Kelly v. Thewles*, 2 Ir. Ch. Rep. 510). And a will will not be set aside on the ground of undue influence, unless the evidence establishes the ascendancy of the controlling power, and its actual exercise in constraining or coercing an enfeebled, exhausted or subjugated intellect

(*ib.*). Fraud to vitiate a will must be contemporaneous with the making of the will; it must be discovered in and be part of the *res gestæ*; the means and power of achieving the fraud may have been previously acquired, but the Court must be satisfied that the act impeached was effected by the use and exercise of those means and that power at the time of making the will, in such manner as to control and defeat the volition of the testator (*ib.*). On the subject of undue influence in general, see the notes to *Huguenin v. Baseley*, in 2 Tud. L. C. Eq. 462–503; see also *Fowler v. Wyatt* (24 Be. 237); *Scholefield v. Templer* (5 Jur., N. S. 619); *Lyon v. Home* (L. R., 6 Eq. 655).

A will written, or procured to be written, by a person who is benefited thereby, is not void; but the circumstance forms a just ground of suspicion, and unless clear and satisfactory proof be given that the document propounded expresses the wishes of the testator, it will be pronounced against; see *Smith v. Shelton* (9 Jur. 715); *Baker v. Batt* (2 Moo. P. C. 317), a case of husband and wife, respecting the will of the latter; and *Harwood v. Baker* (3 Moo. P. C. 282), also a case of husband and wife, respecting the will of the former. See also, as to a wife's control and influence, held not to be undue, *Stulz v. Schœffle* (16 Jur. 909). The circumstance of a solicitor preparing for a client a will containing dispositions in his own favour, does not prevent him from taking the benefit, if no undue influence is used (*Hindson v. Weatherill*, 1 S. & G. 604, 5 D. M. & G. 301); and in *Barry v. Butlin* (2 Moo. P. C. 480), where the solicitor was a benefited party, the will was pronounced for, with costs. See also *Butlin v. Barry* (1 Cur. 614, 637); *Walker v. Smith* (29 Be. 394). But in *Dufaur v. Croft* (3 Moo. P. C. 136), a will made by a solicitor was rejected on the ground of undue influence; see also *Waters v. Thorn* (22 Be. 547). Wills made during illness in favour of medical attendants are viewed with great jealousy (*Greville v. Tylee*, 7 Moo. P. C. 320); see also *Jones v. Goodrich* (5 Moo. P. C. 16); *Reece v. Pressey* (2 Jur., N. S. 380); and in *Durnell v. Corfield* (1 Rob. 51, 3 L. T. 323), the will of an old man of weak capacity, in favour of his medical attendant, was pronounced against; but costs were not given against the person propounding the will, as it was a case of *deficit probatio*. As to the case of guardian and ward, see the remarks of Sir G. Turner, L. J., in *Hindson v. Weatherill* (5 D. M. & G. 313).

A will may also be impeached on the ground of fraud, but the courts require strong evidence to show that a duly executed will is not the act of the testator, and that he was not aware of its provisions. Thus in *Wrench v. Murray* (3 Cur. 623), a will made at the instance of the sole beneficiary, who was in nowise related to the testator, was pronounced valid on proof of the capacity of the testator, and of the will having been read over to him. And in *Panton v. Williams* (2 Cur. 530), where probate was opposed on the ground of forgery and fraud, the Court pronounced for the will (but with great doubt and difficulty), upon the testimony of two attesting

Will procured by person benefited, suspicious.

Husband or wife.

Solicitor.

Medical attendant.

Guardian.

Fraud.

lucid interval (*d*)—drunkenness (*e*) or any other cause (*f*); and here we may suggest with respect to testators of weak understanding, generally, that they should be required to give written instructions, which, if evincing mental power, may be useful as evidence of competency, in aid, at least, of other proof.

Persons born
deaf and
blind.

4. Persons born deaf and blind, consequently dumb (*g*), and, therefore, wholly destitute of the common organs of mental perception; for as “wisdom at one entrance quite shut out,” may still find another inlet, or, once admitted, may remain, after all its natural ports are closed against new ideas, nothing short of the original co-existence of all these functional defects can produce legal incapacity (*h*); though, of course, the existence of any peculiarity in regard to the personal circumstances of the testator will dictate additional caution to his professional adviser, as, for instance, that of carefully reading and explaining the intended will to a blind testator (*i*). In all the cases comprised under this head, the law proceeds, not upon any narrow technical grounds, but on the absence of intellectual power adequate to form, and, by certain signs, to

witnesses to the execution. But in *Scouler v. Plowright* (10 Moo. P. C. 440, 5 W. R. 99), where the will was prepared by the person principally benefited, and the conduct of the testator, as described in evidence, showed that he was either ignorant of the contents, or was acting under control when he signed it, the Privy Council rejected the will, and on the ground of fraud condemned the party propounding it in all the costs.

Duress.

Further, a will is invalid if procured from, and executed by, a testator under duress, whether it be duress of imprisonment or duress *per minas*. As to a testator acting under control equivalent to duress, see *Scouler v. Plowright* (*ubi sup.*). Naturally, however, such cases are of rare occurrence; the same result being attainable, not so quickly or directly, but with smaller liability to defeat, by the exercise of a less violent form of coercion, and by the insidious agency of influence and moral control.

(*d*) *Beverley's case*, 2 Rep. 123 b.

(*e*) *Garthside v. Isherwood*, Shep. Touch. 403, n. 14.

(*f*) Swinb. 133.

(*g*) Dumbness is not, it seems, in the present state of science, a necessary consequence of congenital deafness, unless vision be also originally deficient. And see Co. Litt. 42, b, where it is said that a man deaf, dumb and blind from his nativity hath not ability to enfeoffe.

(*h*) 1 Wms. Exors. 16.

(*i*) See *ante*, pp. 14, 16.

communicate, a rational volition; on the actual, and not the presumable, obscuration or disturbance of that higher faculty which ennobles and distinguishes man. As the inquiry must always be, whether the testator was of competent understanding or not, this head is virtually included under that which immediately precedes it. 5. Persons attainted of, or outlawed for, high treason (*h*); also persons attainted of (*l*), or outlawed for, petty treason (*m*) or felony (*n*); but as to traitors of this lower grade and felons, doubts are entertained how far their disability, as modified by a recent statute (*o*), extends to real estate. 6. Persons outlawed in a personal action (*p*), until a reversal of the outlawry; also felons of themselves, if found such by the verdict of a coroner's jury (*q*); but the disability of this class of felons, and of outlaws, is confined to personal estate (*r*). 7. Aliens, unless enabled by naturaliza-

Traitors and felons.

Outlaws and felons de se.

Aliens.

(*h*) 5 & 6 Edw. 6, c. 11, s. 9.

(*l*) *I. e.* on whom judgment of death has been recorded, 4 Jarm. Byth. 74. And see 12 Geo. 3, c. 20; 4 Geo. 4, c. 48; 6 & 7 W. 4, c. 30.

(*m*) Petit treason is now to be treated in all respects as murder, 9 Geo. 4, c. 31, s. 2; repealed by 24 & 25 Vict. c. 95, in effect re-enacted by 24 & 25 Vict. c. 100, s. 8.

(*n*) Plow. 258, 259.

(*o*) 54 Geo. 3, c. 145. Since that Act it would seem that felons, except in cases of treason or murder, may dispose of an estate or interest in lands to commence after their deaths (Burt. Comp. s. 191).

(*p*) Godolph. 37.

(*q*) Shep. Touch. 403, n. (16); Godolph. 37; Dyer, 262 a, pl. 31. See the notes to *Attorney-General v. Sands*, in Tnd. L. C., R. P., 664, *et seq.* But there is a distinction between the operative effect of a testamentary instrument and its title to probate; and the executor of the will of a person found *felo de se* by the verdict of a coroner's jury is entitled to probate thereof, though the effect of the verdict is to work a forfeiture to the Crown of all the personalty of the deceased (*Re Bailey*, 2 Sw. & Tr. 156; 7 Jur., N. S. 712).

Testator *felo de se*.

A person appointed executor, and after the testator's death convicted of felony, is not thereby disentitled to exercise the rights of an executor; his office, being *in autre droit*, is not forfeited by his conviction (*Smethurst v. Tomlin*, 2 Sw. & Tr. 143; 7 Jur., N. S. 763).

Felon executor.

(*r*) Shep. Touch. 404, 405. Freeholds of inheritance, which at the time of his death belonged to a person who died *felo de se*, do not escheat to the Crown, but devolve upon the heir-at-law (*Norris v. Chambres*, 29 Be. 246, 258).

Felo de se, escheat.

Monks, &c.

tion or denization (*s*), but only as respects the inchoate title of the crown to their real estate, which title they cannot defeat—in other words, the crown may seize, after the alienage has been found by inquisition, but in the meantime (*t*) the lands pass by the devise; and aliens may bequeath, with effect, their personal estate (*u*). 8. Persons, according to the old books (*x*), who by dedicating their lives to the religion of the cloister, have committed civil suicide. But profession in an order of religion was triable only by the certificate of the bishop of the diocese in which it took place; and as the courts never took notice of the certificates of foreign bishops, and as English bishops now take no notice of profession in England, this disqualification, if it can be said to exist at all, exists only in contemplation of law. Indeed, as superstitious vows can have no binding force in this protestant country (*y*), but, like the chain of slavery, dissolve before the breath of freedom, profession, as such, though the act may be criminal (*z*), appears to be simply nugatory here, and consequently unattended with any disqualifying effect (*a*).

Thus, though the catalogue may seem long, it appears that the disqualifications to dispose by will are practically few, and are either imposed by physical causes, or justified by legal or moral reasons.

Naturalization.

(*s*) Shep. Touch. 403. Prior to the passing of the Act 7 & 8 Vict. c. 66, an alien could be naturalized only by means of a private Act of Parliament, and made a denizen only by letters-patent. By the Act 7 & 8 Vict. c. 66, an alien may be naturalized for many purposes by the more easy and inexpensive process of obtaining a certificate from a Secretary of State. The grant of letters of denization is unaffected by that Act. As to the naturalization of residents in the British Colonies, see 10 & 11 Vict. c. 83.

Denization.

(*t*) See 4 Leon. 84; *Burk v. Brown*, 2 Atk. 397; *Barrow v. Wadkin*, 24 Be. 10.

(*u*) Com. Dig. "Alien" (C. 7).

(*x*) Shep. Touch. 404; Swinb. Part 2, s. 26. (See Perk. s. 502.)

(*y*) 2 Roll. Ab. 13; Sto. Confl. of Laws, ss. 94, 96, 97, 104.

(*z*) By the 10 Geo. 4, c. 7 (the Catholic Relief Act), males becoming, within this kingdom, Jesuits, or members of any religious order of the Church of Rome, are liable to banishment for life, sect. 34; and see ss. 28-34. See also 2 & 3 Will. 4, c. 115; *De Themmines v. De Bonneval*, 5 Rus. 288; 7 & 8 Vict. c. 27, s. 15 (*Ireland*).

(*a*) See *Re Metcalfe's Trusts* (2 D. J. & S. 122).

II. But a far more bold and sweeping innovation consists in striking at the ancient requisite, as regards real estate, of ownership in the testator at the making of the will—a requisite peculiar to England, and according to Lord Coke founded on the “having” of the old statutes of wills (*b*), but, in fact, more remotely rooted in the “seisin” of the feudal law (*c*)—and by at once enlarging the testator’s disposing power to the whole extent of embracing all his property, as well real as personal, whether acquired before or after the execution of the will (*d*). This power expressly includes interests under contingent and executory gifts of every kind, without regard to the fact whether the testator was or was not ascertained (*e*) as the object of the gift; and even rights of entry, though not rights of action, *i. e.* of bringing a *real* action; which latter, however, by reason of another recent statute (*f*), can now rarely exist.

II. AS TO THE
EXTENT OF
THE TESTA-
MENTARY
DOMINION.

After-ac-
quired pro-
perty.

Rights of
entry.

Estates not
devisable.

On the other hand, this enactment is rightly confined to property, which, if left to be disposed of by law, would descend to or devolve upon the heir at law or customary heir, or the executor or administrator of the testator (*g*); in other words, to property which, if undisposed of by the deceased possessor, would follow the ordinary course of succession ordained by law, and be liable in the hands of the successors, as his real or personal representatives, to satisfy his debts and engagements generally (*h*); but an estate limited to heirs of the body, *i. e.* an estate tail (*i*), devolves under the peculiar protection of the

Estates tail.

(*b*) 32 Hen. 8, c. 1; 34 & 35 Hen. 8, c. 5. *Butler and Baker’s case*, 3 Rep. 15, 10 Rep. 83, 4 Bur. 1960; *Harwood v. Goodright*, Cowp. 90.

(*c*) Year Book, Michaelmas Term, 39 Hen. 6, fol. 18, pl. 23.

(*d*) Sect. 3.

(*e*) See *ante*, p. 5.

(*f*) 3 & 4 Will. 4, c. 27, sects. 36, 37, 38.

(*g*) Sect. 3; and see sect. 1.

(*h*) As to Escheat, see *ante*, p. 4; and see and consider 3 & 4 Will. 4, c. 106, s. 2.

(*i*) Real estate of inheritance, including therein copyholds held of manors in which there is a custom to entail, can alone be the subject of a proper entail. When leaseholds for lives are limited to A. and the heirs of his body, he is said to take a *quasi* estate tail, which is barrable without an enrolled deed pursuant to 3 & 4 Will. 4, c. 74. But if there is a tenant for life and a tenant in tail in remainder of leaseholds for lives, the consent of the tenant for life is necessary to enable the tenant in tail to bar the

What may be
the subject
of an entail.

Bar of *quasi*
estates tail by
unenrolled
deed.

Estates in
joint-
tenancy.

legislature (*k*), in an extraordinary manner, and is not to be diverted from the course marked out on its creation, without the observance of certain appropriate forms prescribed by the same supreme authority. Tenants in tail, therefore, cannot dispose by will without barring the entail, for which, however, a cheap and easy method is now provided (*l*); but the devise of a tenant in tail would, if he should afterwards acquire the fee, be effectual. Still less can the testator, by his posthumous act, defeat a title commencing in his lifetime and consummated by his death. Hence, a joint-tenant, as such, cannot devise or bequeath; for the *jus accrescendi*, incident to that species of tenancy, vests at the instant of his death, and to treat the will as a severance would be to allow it the effect of a conveyance *inter vivos*; but if a joint-tenant, having made a will, which, but for the joint-tenancy, would pass the property, should, by severance, partition, or survivorship, become the owner in severalty of the whole or part, divided or undivided, his previous devise would, of course, be operative. In short, under the sweeping power conferred by the statute, a man, by his will, executed presently, may dispose of all that can, at his death, be justly denominated his own.

Enlarged
operation of
a general
devise

It would follow from the above extension of the devising power, unaided by another enactment (*m*) to be presently noticed, that a general devise of real estate must have an operation, commensurate, at least, with that which, under the old law, was peculiar to a general bequest of personal estate—

Copyholds.

Leaseholds
for years.

subsequent remainders (1 Hayes, Conv. 197; *Allen v. Allen*, 2 Dr. & War. 337; *Edwards v. Champion*, 3 D. M. & G. 202; *Pickersgill v. Grey*, 30 Be. 352). If copyholds, held of manors in which there is no custom to entail, are limited to A. and the heirs of his body, A. will take an estate in those copyholds analogous to an estate in fee simple conditional at the common law (*Doe v. Clark*, 5 B. & Al. 458; *Doe v. Simpson*, 4 Bing. N. C. 333, 340; 3 M. & Gr. 929). And if leaseholds for years, or other personal estate, be limited to A. and the heirs of his body, A. takes at once the absolute property, just as he would take it under a simple indefinite gift (*Leventhorpe v. Ashbie*, Roll. Ab. 831, pl. 1; Tud. L. C., R. P. 763).

(*k*) 13 Edw. 1, c. 1 (Statute de Donis Conditionalibus).

(*l*) 3 & 4 Will. 4, c. 74 (*England and Wales*); 4 & 5 Will. 4, c. 92 (*Ireland*).

(*m*) Sect. 24.

the operation of passing whatever property, falling within the terms of the gift, may belong to the testator at his death. Thus, a devise of all the testator's lands, or of all his lands in a particular county, parish, or occupation, or held by a particular tenure, would draw to itself all future acquisitions of the given description from whatever source derived. This potency of a general devise may suggest the expediency, in some cases, of providing for the eventual acquisition of real estate by the testator, and in others, of cautiously restricting the devise to property already acquired (*n*).

—suggests
what cau-
tions.

Copyhold and customary estates, to which the testator is entitled as a devisee or surrenderee, but to which he has not been admitted, may now be devised without his previous or subsequent admittance (*o*). The statute embodies and amends the provisions of a former Act (*p*) for superseding the necessity of surrendering copyholds to the use of the will, so that now no surrender is needed to give effect to a devise of copyholds, or of any other species of customary estates (*q*), unless the surrender be, as it is in the case of a joint-tenant or of a feme covert, something more than a formal (*r*) requisite. The statute also confers a devising power on such copyhold and customary tenants as were before restrained, by the particular custom, from devising (*s*).

Copyhold and
customary
estates.

Estates *pur autre vie*, as leases for the lives of others are technically called, which were first made devisable by the Stat. of Frauds (s. 12), have likewise retained their former position (*t*); except that the extension of the devising power to interests which would have devolved to the heir, (meaning, of course, the heir general,) may be considered as impliedly denying the power of testamentary disposition to *quasi* tenants in tail of lands held *pur autre vie*, (of which, as not being

Estates *pur
autre vie*.

(*n*) See *ante*, pp. 5, 43—46.

(*o*) Sect. 3; and see ss. 4, 5.

(*p*) 55 Geo. 3, c. 192.

(*q*) Sects. 3, 4, 5.

(*r*) *Porter v. Porter*, Cro. Jac. 100; *Gale v. Gale*, 2 Cox, 136; *Doe v. Bartle*, 5 B. & Al. 492; *Doe v. Ludlam*, 7 Bing. 275; *Doe v. Bird*, 5 B. & Ad. 695. See also sect. 8.

(*s*) Sect. 3.

(*t*) Sects. 3, 6.

regularly entailable, entails were, and still are, barrable by an unenrolled (*u*) conveyance,) and as having thereby finally disposed of any lingering doubt respecting the incompetency of such tenants to defeat the *quasi* entail by will (*x*).

This portion of the statute, which has given, expressly, to the testamentary power all the scope of which it appears to be fairly susceptible, must always be considered as the most valuable.

III. AS TO
THE EXERCISE OF TES-
TAMENTARY
POWERS OF
APPOINT-
MENT—

III. The exemption of testamentary appointments from the necessity of referring or alluding to the power, or its subject, or of otherwise indicating, expressly or constructively, an intention to appoint, by virtue of a power, as distinguished from an intention to devise or bequeath, by force of an interest, may also be considered as extending the range of testamentary dominion, while it extinguishes a prolific source of litigation; for the distinction was too refined to be appreciated by ordinary testators, and many a testamentary appointment, therefore, either failed, or was capable of being supported only by extrinsic evidence. But now a gift, in general terms, acts indifferently upon ownerships and testamentary powers (*y*), whether the power was created before or after the statute came into operation, unless the power be confined to specific objects (*z*), whether individuals or classes (as in the instance of a power to appoint in favour of A., or in favour of the “children” of A.), and then there must still be a reference to the power, or some equivalent denotation of the intention to exercise it (*a*).

—by a ge-
neral devise
or bequest.

After-ac-
quired ge-
neral powers.

It should seem, that the operation of a general gift, upon general testamentary powers, must be determined by analogy to its effect upon after-acquired property, strictly such; and that, consequently, where a general power of appointment is given to the survivor of A. and B., the power would be well exercised by a general devise or bequest contained in the will of A., though made in B.’s lifetime, if the testator, by surviving

(*u*) *Ante*, p. 73, n. (*i*).

(*x*) 1 Jarm. Wills, 56.

(*y*) Sect. 27.

(*z*) *Id.* (Note the words of this section—“*in any manner he may think proper.*”)

(*a*) See *ante*, p. 51.

B., should eventually become the donee of the power (*b*); and that principle has been held to extend to the case of a general power given to the testator by an instrument not in existence at the making of his will (*c*), and to the case of a general equitable testamentary power given to the survivor of A. and B., which has been held to be well exercised by the will of A., a married woman, executed during coverture in the lifetime of B., whom A. survived (*d*).

IV. While the old law studiously guarded devises of freehold estates, by prescribing certain formalities of execution and attestation (*e*), it was altogether indifferent, on these points, as to bequests of personal estate and devises of copyhold property. There were two objects, therefore, to be accomplished: first, to render the law, in this respect, uniform; secondly, to render it simple and certain.

IV. AS TO
THE EXECU-
TION AND
ATTESTATION
OF WILLS.

State of the
old law.

The statute 1 Vict. c. 26, s. 9, requires that wills of every description, except wills of personal estate made by soldiers in actual service, and by mariners or seamen at sea (*f*), shall be signed at the foot or end of the instrument by the testator or some person in his presence, and by his direction; which signature is to be made, or acknowledged, before two or more witnesses, who are to be present at the same time, and are to attest and to subscribe the will in the presence of the testator; but the concluding member of the section declares that no form of attestation shall be necessary. The terms, in which these essential ceremonies—ceremonies to be observed by all—are enacted, were but ill adapted to convey the requisite information, promptly and clearly, to either the professional or the popular mind. The litigation upon the 9th section became frequent and serious. Many wills were declared invalid for want of a literal compliance with the terms of the Act, especially with regard to the position of the testator's signature at the "foot or end" (*g*) of the will. The legislature again interposed, and by the Act

The new re-
quisites.

(*b*) Sects. 3, 24, 27.

(*c*) *Stillman v. Weedon, Cofield v. Pollard, ante*, p. 49.

(*d*) See *Thomas v. Jones, ante*, pp. 9, 46.

(*e*) 29 Car. 2, c. 3, s. 5.

(*f*) See notes to ss. 11, 12, *ante*, pp. 25–28.

(*g*) *Ante*, p. 13.

15 & 16 Vict. c. 24 (*h*), provided for many of the particular cases in which wills had been held to be imperfectly executed under the 9th section. We proceed to indicate, as briefly and distinctly as may be, those ceremonies attending the execution of a will, which a safe exposition of the two statutes taken together, and a due regard to the authentication of the instrument, and to the rights of property, seem to enjoin or strongly recommend.

Signing
by, or for, the
testator.

1. The testator should sign his name in his usual form and manner, underneath the last line of the will; and his signing must precede that of the witnesses, for if the witnesses, or either of them, sign before the testator, the execution is bad. The testator, if unable to write his name, should cause some person, in his presence, so to sign his (the testator's) name; for though a mark, but not a seal (*i*), would *do* (*h*), yet, at this day, a mark is a very rude and unauthentic mode of signing. If it can be avoided, though there are no words in the statute on which any legal objection (*l*) can be founded, the person procured to sign for the testator should not be also one of the witnesses.

2. Acknowledgment, by the testator, of a previous signature.

2. Where the will has been signed in the absence of the witnesses either by or by the direction of the testator, he should audibly acknowledge to the witnesses,—for though constructive acknowledgment may be sufficient, and, in particular cases, as that of a dumb testator, more could not reasonably be required, still an express acknowledgment is to be preferred (*m*)—that the signature was made by him, or, as the case may be, by a designated individual in his presence, and by his direction (*n*); and even where the act of signing is performed in the presence of the witnesses, it will be proper that their attention should be particularly directed to the signature (*o*). But if the will

(*h*) *Ante*, p. 21.

(*i*) See *ante*, p. 15.

(*h*) See *ante*, p. 14.

(*l*) See *ante*, p. 15.

(*m*) See *Ross v. Ewer*, 3 Atk. 156; *Moodie v. Reid*, 7 Tau. 361; *Doe v. Burdett*, 6 Nev. & M. 259; *Mackinley v. Sison*, 8 Sim. 561. See also *ante*, pp. 16, 17.

(*n*) *Ilott v. Genge*, 4 Moo. P. C. 265.

(*o*) See *ante*, pp. 14—16.

consist of several sheets—though, for greater certainty, and to prevent interpolation, each should be signed at the foot (*p*)—it is not absolutely necessary to sign, or to acknowledge the signing of, any other than the last sheet, in the presence of the witnesses (*q*).

3. Though it is not essential that either the person, if any, who signs for the testator, or the witnesses, should have the slightest knowledge of the nature of the document—for even while publication, now expressly abolished (*r*), was a legal, though an empty sound (*s*), the testator might have been silent if not deceptive (*t*), upon that point—yet, unless there be some strong motive for concealment, the testator will do well to declare that the document is his will, or, as the case may be, a codicil to his will (*u*). It is desirable that the several sheets, if more than one, composing the will, should be attached, or, at least, be present together at the time of execution (*x*).

3. Disclosure of the character of the instrument.

4. The witnesses must be two (or more) in number, and must be simultaneously (*y*) present, when the signature by or for the testator, or his acknowledgment, is made; the testator, and the witnesses, should be within sight and hearing of each other; and although the statute does not say that the witnesses shall subscribe at the same time (*y*), or in the presence of each other, as well as of the testator, the three should not separate till the witnesses have both subscribed. Such subscription, which must be in the witness's own handwriting, should contain his name written in his usual form and manner—though a mark, which, as we have seen, even in the case of the testator, satisfies the statute, would be a sufficient subscription by a witness (*z*)—also his abode and quality. The witnesses are required to attest, as

4. Presence, and subscription, of the witnesses.

(*p*) See *Right v. Price*, 1 Doug. 241; *Winsor v. Pratt*, 2 Br. & B. 650; 5 J. B. Moo. 484.

(*q*) See *ante*, p. 13; and pp. 21–24.

(*r*) Sect. 13.

(*s*) *British Museum v. White*, 6 Bing. 310; *Wright v. Wright*, 5 Moo. & P. 316.

(*t*) *Trimmer v. Jackson*, 4 Burn's Ecc. L., 6th ed., 130.

(*u*) See *ante*, pp. 14, 28.

(*x*) See *Bond v. Scavell*, 3 Bur. 1773. See *ante*, p. 11.

(*y*) See *ante*, p. 15.

(*z*) *Harrison v. Harrison*, 8 Ves. 186. See *ante*, p. 19.

well as to subscribe. By the attestation here contemplated must be understood that mental observation (*a*) which enables men to testify concerning matters transacted before them; for the notion, founded on a misconception of a subsequent provision of the statute, that the solemnity of attesting may now be fulfilled by corporeal presence alone (*b*), has been too hastily adopted. With respect to the number of witnesses, the statute has fixed no maximum; and some professional men, conceiving that, where real estate is concerned, there may yet be magic in three witnesses (*c*), still assemble the old complement; but this practice is injudicious, as tending to increase the danger of miscarriage, and the difficulty of proof. The place of residence and the occupation of each witness should be appended to his name, to facilitate his discovery in case the will has to be proved *per testes*.

5. Memo-
randum of
attestation.

5. An attestation clause is not necessary. Such is conceived, at least, to be the true result of this somewhat obscure section (*d*), made darker by the last explanatory adjunct. But a formal memorandum should always be added in order to facilitate probate, which would not otherwise be granted without a special affidavit; to afford evidence of title to the property devised, for a purchaser would otherwise require a statutory (*e*) declaration by the witnesses; and, lastly, to fix the attention of the witnesses upon the facts which it is expedient that they should certify, and which, having thus certified, they could not afterwards so effectually deny. This clause should express that the instrument has been signed—not, as heretofore, “signed and published,” for no publication is requisite (*f*)—by the testator (or, as the case may be, signed by a designated individual, in the testator’s presence, and by his direction), as the last will of the testator, in the presence of the witnesses, present at

(*a*) *Harris v. Ingledew*, 3 P. W. 91. See *ante*, p. 17.

(*b*) H. Sugd. Wills, 37. See *ante*, p. 17; 1 Hayes, Conv. 360.

(*c*) See 29 Car. 2, c. 3, s. 5, “three or four credible witnesses.” See *ante*, p. 4, as to Escheat. And as to real estate in the colonies, &c., cf. *post*, p. 96.

(*d*) Sect. 9.

(*e*) 5 & 6 Will. 4, c. 62.

(*f*) Sect. 13.

the same time ; also, that the witnesses have subscribed in his sight and presence—so far the memorandum would record matters which are of the very essence of the execution—and (it may be well to add) in the presence of each other. At the foot of this memorandum, and not elsewhere, the witnesses, having first perused it, should sign as directed under the preceding head.

6. As witnesses, being either objects, or married to objects, of the testator's bounty, absolutely forfeit, by the act of subscribing, the benefits intended for them, they are of course improper, though sufficient (*g*) witnesses ; and the persons selected for such a duty should, as will naturally occur, be intelligent, as well as indifferent persons (*h*).

6. Selection of the witnesses.

7. ALL testamentary papers, without exception, must be executed and attested in the manner prescribed by the statute, and its provisions cannot be evaded, even by means of a power created for the purpose (*i*). In preparing testamentary appointments, we were wont to consult the power as to the requisites of execution and attestation ; and we know that equity (always too prone, when legal fetters annoy its jurisdiction, to erect itself into a court of repeal,) aided, in favour of particular claimants, the neglect of that form which the power had prescribed (*h*). But now the statute is the sole, universal, and inexorable guide ; nothing additional can be imposed, nothing there enjoined can be dispensed with, no inadvertence can ever be helped. Henceforth, therefore, testamentary appointments must be executed and attested according to the statute, and should be executed and attested without regard to the power (*l*), whether the power were created before or after the statute came into operation ; and clauses which confer testamentary powers should either be wholly silent, in regard to execution and attestation, or simply refer to the statute.

7. Universality, and inflexibility, of the statutory requisites.

Testamentary appointments.

(*g*) Sect. 15.

(*h*) 1 Hayes, Conv. 363.

(*i*) *Johnson v. Ball*, 5 De G. & S. 85.

(*h*) Sugd. Pow. ch. xi.

(*l*) But as to a seal to a will being in some cases necessary, see *ante*, pp. 24, 25.

It happens here, as on all transitions from an old to a new system, that we have to wean ourselves from inveterate habits of thought, conduct and expression ; and, as the process will be the least difficult to that mind which accommodates itself the most readily to every change of artificial modes, versatility is one of the mental qualities to be cultivated in the present transitive state of our institutional laws.

General reflections on this branch of the statute (*m*).

We have dwelt in detail upon this branch of the statute, on account both of its general importance and of its proportionate ambiguity. Of those observances which have just been enumerated, some, it will be perceived, are clearly indispensable, others of doubtful necessity, and the rest are merely prudential. The new ceremonial seems to have been adjusted on a principle of compromise ; for while something has been deducted from the old solemnities, as respects real estate, the want of all solemnity, as respects personal estate, has been more than sufficiently supplied. We had been struggling for centuries to secure perfect freedom of disposition, and had attained a large, perhaps too unlimited, dominion over personal estate, when by this statute, we were suddenly prohibited from bequeathing a ring, without the formal summoning of two witnesses, to be present together in the sick man's chamber ; who, yet, by deed, or other less solemn act *inter vivos*, may give away all his property without any witness at all. This would seem to indicate a retrograde movement in the march of legislation. If, instead of imposing these fetters upon the testamentary disposition of personal estate, the legislature had proceeded, in the laudable spirit of emancipating the transfer of property from all inconvenient and unpalatable observances, to get rid, for the most part, of the ceremonial which clogged devises of land (*n*), and which seems to have been suggested by some antiquated notion of protecting the heir, the statute would have conferred on the public a more decided boon. Though some

(*m*) The editor has retained these reflections, though they were more applicable to the period immediately after the passing of the Act than to the present time ; and the same remark will apply to other portions of this "Practical View." See also 1 Hayes, Conv. 367; 14 Jur. 492, 499, Part 2.

(*n*) 29 Car. 2, c. 3, s. 5 (Statute of Frauds).

portion of the litigation which arose from the extreme laxity of the old practice as to testaments may now be prevented, yet the remedy applied will involve the destruction of many wills which ought to be upheld (*o*). This was not a dry point of law, but a great question of national policy, which, as it came home to the business and bosom of every man, ought to have been well considered, with reference to the character and habits of the people. A long period must elapse before the new law can be generally known and understood beyond the professional pale; and even when it shall have been fully promulgated, a strict observance of its requisites will often prove irksome and difficult, sometimes impossible. The new ceremonial, prescribed for all testators, under all circumstances, must, therefore, tend to create intestacies, by which families may be seriously injured, while but little fraud will be prevented; and, at last, the pressure of the evil, seconded by a general and invincible repugnance on the part of the people to strait-laced enactments, in matters long abandoned to their own free choice of time, place and circumstance, may procure for this measure, or rather this branch of the measure, the fate of that law which it has recently superseded (*p*); thus affording another proof, that, in such matters, jurisprudence then shows itself most wise, when it is least rigid, when it bends to the humour and even prejudices of the many, for whom its regulations are not practically beneficial, merely because they are theoretically beautiful.

V. We now proceed to the revocation and the alteration of wills. These also are placed on a new basis; for not only is a revoking will, whether of real or of personal estate, subjected to the same regulations, in regard to execution and attestation, as a disposing will (*q*), but other important changes are introduced.

V. AS TO
THE REVO-
CATION AND
ALTERATION
OF WILLS.

(*o*) See 1 W. Bl. 100, where Lord *Mansfield* observes, with reference to the Statute of Frauds (29 Car. 2, c. 3), that more fair wills had been destroyed for want of observing its restrictions, than fraudulent wills obstructed by its caution. And see the cases cited in the notes to sect. 9, *ante*, pp. 9—21, verifying the predictions in the text.

(*p*) See 15 & 16 Vict. c. 24, *ante*, pp. 21—24.

(*q*) Sects. 20, 21 and 22.

Revocation
by marriage.

Thus, the mere marriage of a testator produces a total revocation (*r*) — except of testamentary appointments, in cases where the property would not, in default of appointment, go to the testator's heir, executor, administrator, or next of kin (*s*) — without the additional circumstance, formerly requisite, of the birth of a child; so that, in this respect, the will of a man is placed on the same footing as that on which the will of a woman formerly stood, and, indeed, still stands (*t*). The language of this enactment, it will be observed, is absolute; and, therefore, the revocation would not be prevented by the strongest declaration of the testator that his will shall, notwithstanding any future, or even an actually contemplated marriage, continue in force. It is easy to suppose that cases may occur in which the testator's intention would not be altered by the change of his condition; as where he has made a disposition in favour of his family by a deceased wife, and contracts marriage again with a woman for whom he has amply provided by a jointure, and by whom there is not any moral chance of his having issue. The undistinguishing operation of this enactment, by which on the marriage of every person, male or female, under any circumstances, his or her will is reduced to waste paper, should be generally known.

Change of
circum-
stances.

But as the statute abolishes revocation on the ground of a presumed intention from an alteration of circumstances (*u*), marriage is now the only extrinsic circumstance capable of working a revocation.

New modifi-
cation of
estate.

The statute also abolishes revocation by means of a conveyance (*x*), except so far as the conveyance, by substantially aliening the property, withdraws it from the testator's control. A devise, therefore, unless specially restricted, will operate on whatever interest the testator may have in the property at his death, notwithstanding any new modification or partial alienation of his ownership, which may have taken place subsequently to the execution of the will. The constructive revocation of

(*r*) Sect. 18.

(*s*) See *ante*, p. 31, n. (*u*).

(*t*) Sect. 18.

(*u*) Sect. 19. See *Johnston v. Johnston*, 1 Phillim. 447.

(*x*) Sect. 23.

devises, by the execution of conveyances designed only to create a charge upon the estate or to effect some other limited purpose, but stretched by technical reasoning far beyond the intention, often produced injustice (*y*).

Under the old law, a will might have been revoked by burning, tearing, cancelling, or obliterating, without the presence or attestation of any witness; proof or presumption that the act was that of the testator sufficed. The statute, however, makes this important distinction between the act of burning, tearing, or otherwise destroying the substance of the will, and a mere obliteration of its contents:—it allows the former acts, if done *animo revocandi* (*z*), still to have a revoking effect, though unattested and unseen by any witness (*a*); while any obliteration, whether of the whole or part only of the will, as well as an interlineation, is required to be executed and attested with the same solemnity as an original will (*b*), except that (and here the legislature must be allowed to speak in its own peculiar language) “the will, with such alteration as part thereof, shall be deemed to be duly executed, if the signature of the testator, and the subscription of the witnesses, be made in the margin, or on some other part of the will, opposite or near to such alteration, or at the foot or end of, or opposite to, a memorandum referring to such alteration, and written at the end or some other part of the will.”

Destruction
of the instru-
ment.

Obliteration
and inter-
lineations.

It is important to bear in mind the fact, that this statute does not, like the former law (*c*), admit of the revocation of a will by cancellation, without more (*d*); and, therefore, if a testator, meaning to annul his will, should draw his pen across the sheets, or through his signature, or have recourse to any other mode of defacing the writing, still the instrument, so far as its

Cancellation.

(*y*) *Bullin v. Fletcher*, 2 M. & C. 432; *Plowden v. Hyde*, 2 D. M. & G. 684; *Schroder v. Schroder*, Kay, 578; 3 W. R. 55; 1 Jarm. Wills, ch. 7, sect. 3.

(*z*) See *Pemberton v. Pemberton*, 13 Ves. 290; *Doe v. Perkes*, 3 B. & Al. 489; *Doe v. Harris*, 6 A. & E. 209; 8 A. & E. 1. And see *ante*, pp. 33—36.

(*a*) Sect. 20.

(*b*) Sect. 21.

(*c*) 29 Car. 2, c. 3 (Statute of Frauds).

(*d*) See *ante*, p. 33.

contents might yet be discernible (*e*), would remain in full force as his will, unless such cancellation were executed and attested as the statute requires in the case of a will.

Revival of
revoked
wills.

Before we close this head, attention should be particularly pointed to the circumstance, that the revival of a revoked will, whether revoked before or after the statute came into operation, can be effected only by re-execution, or by a codicil expressive of an intention to revive the will (*f*).

VI. As to
THE LAPSE
OF DEVISES
AND BE-
QUESTS.

Old law.

VI. Considerable alterations have been made in the doctrine of lapse. Lapse is the failure of a testamentary gift by the death of its object in the lifetime of the testator. Where the interest given is circumscribed by the life of the deceased devisee or legatee, or depends upon a circumstance which is personal to him, and which has not occurred (as his attainment of the age of twenty-one), the gift necessarily fails; and though the interest should be capable of transmission to his representatives, yet, as it never vested in him, his heirs, executors or administrators could take it only by force of special words of substitution. If the whole and absolute interest was given, then, under the old law, the death of the devisee or legatee caused an intestacy as to the subject of the lapsed gift, unless it were personal property and the will also contained a residuary bequest; if less than the whole and absolute interest was given, then the expectant dispositions, if any, were accelerated. Thus, if Blackacre was devised to A., who died before the testator, in fee, and the residue of the real estate was devised to B., Blackacre did not fall into the residue, but descended to the testator's heir; while if a lease for years, or any other subject of personal estate, was bequeathed to A., who died before the testator, and the residue of the personal estate was bequeathed to B., the subject of the lapsed bequest fell into, and passed as part of the residue to B. But if real or personal estate was given to A., who died before the testator, for the life of B., and, on the death of B., to C., then the remainder to C. took effect immediately on the testator's death (and, unless the case were within the provisions about to be noticed as to

(*e*) Sect. 21. See *ante*, pp. 36—38.

(*f*) See *ante*, p. 40.

children and issue of the testator dying in his lifetime, would still take effect), as an immediate gift in possession, notwithstanding B. should survive the testator. So, if Blackacre was devised to A., who died before the testator, in tail, and on failure of his issue to B., the devise to B. took effect presently, notwithstanding A. left issue, who survived the testator (*g*). Such was the general state of the law, which has been altered as to real estate, by enlarging the operation of a residuary devise, and by carrying out the intended effect of a devise in tail; and, as to both real and personal estate, by attributing new force to gifts in favour of the testator's children or his more remote issue.

Under the new law, if a devisee in fee of specific lands die in the testator's lifetime, the estate comprised in such lapsed devise, instead of devolving on the heir, passes to the residuary devisee (*h*); and so, generally, the property or interest comprised in every devise, lapsing or incapable of effect from any cause whatever (*i*), falls into the residue of the realty. The result of this alteration, taken in connexion with the extension, already noticed, of the disposing power to after-acquired lands (*k*), is, that a testator, whose will contains a complete and operative general or residuary devise in fee, cannot die intestate in regard to any portion of his real estate. Hence there can no longer be any occasion for a subsequent adoption or recognition of the will, in order to extend the operation of a general or of a residuary devise to real estate bought or otherwise acquired since the execution of the will, or comprised in any devise which has lapsed by the death of a devisee in fee.

Lapsed and
void devises,
new law.

The other alterations in the doctrine of lapse are confined to particular cases. The devise for an estate tail in realty to any person dying in the testator's lifetime is made to take effect in favour of the heirs in tail, if any issue in tail be living at the

Devises in
tail of realty.

(*g*) *Brett v. Rigden*, Plow. 343; *Hodgson v. Ambrose*, 1 Doug. 337; 3 Br. P. 416; *Doe v. Kett*, 4 T. R. 601.

(*h*) Sect. 25.

(*i*) *Doe v. Sheffield*, 13 Ea. 526; *Williams v. Goodtitle*, 10 B. & C. 895; 5 M. & Ry. 757, and *Ib. n. (a)*; *Jones v. Mitchell*, 1 S. & S. 293; *Page v. Page*, 2 P. W. 489; but see *Mitford v. Reynolds*, 16 Sim. 105.

(*k*) Sect. 3.

time of the testator's death (*l*); for we think there would be no difficulty in rejecting the construction which refers the words "*such* issue" to the identical issue left by the devisee in tail at *his* death.

Devises and bequests to the testator's issue.

The remaining enactment, under this head, provides, that an interest in real or personal estate, given to a child or other issue of the testator himself, dying in the lifetime of the testator, leaving issue, shall, if any such issue—and even here the word *such* does not necessarily refer to the *very* issue left by the deceased devisee or legatee (*m*)—should survive the testator, not lapse, but belong to the representatives of the child or other issue to whom the devise or bequest purports to be made, as part of his or her own real or personal estate (*n*); and, as such, it will be subject, of course, to the testamentary disposition, if any, of the same child or issue—provided, as to real estate, the will of the child or issue be within the statute, and consequently of force to pass after-acquired (*o*) real estate (*p*)—notwithstanding that such disposition may have the effect of wholly excluding the issue required, by this enactment, to be living at the death of the testator. Of course, where the will itself disposes prospectively, in the event which has happened, of the interest of the deceased child or issue, the operation of the statutory provision is excluded.

Effect of the new rules, as to lapse.

In both the preceding cases, of the gift in tail, and of the gift to a child or other issue of the testator, the statute places the persons claiming under the intended devisee or legatee in the same situation as if such devisee or legatee, instead of dying before, had died immediately after the testator.

Their inapplicability where the gift is to a class.

But neither of the provisions in question can apply where the requisite of surviving the testator is involved in the very description of the objects, and where, consequently, nothing can lapse (*q*) by the death of an individual in his lifetime, as

(*l*) Sect. 32.

(*m*) See *Re Parker*, 1 Sw. & Tr. 523; 6 Jur., N. S. 354; *ante*, p. 57.

(*n*) Sect. 33. See *ante*, pp. 56–58.

(*o*) Sect. 3.

(*p*) See *ante*, pp. 58, 59.

(*q*) *Doe v. Sheffield*, 13 Ea. 526; *Viner v. Francis*, 2 Cox, 190; *Barber v. Barber*, 3 M. & C. 697; *Lee v. Pain*, 4 Ha. 250; *Cruse v. Howell*, 4 Drew. 215.

in the case of a gift to "sons," "daughters," "children," or "grandchildren," as a class; for there, according to the established rules of construction, sons, daughters, children, or grandchildren, dying before the testator, would be considered as not originally within the contemplation of the gift(*r*). It follows, therefore, that where a testator gives his property to a class (for example, to his children equally), and wishes that in case of the death of any child, his or her children (*i. e.* the testator's grandchildren) should be substituted, there should be inserted express words under which the grandchildren would take by substitution; otherwise any child dying in the testator's lifetime would never come within the class, and would consequently take nothing. But where a testator gives property to his children *nominatim*, and one dies in his lifetime, the subject-matter of the gift will form part of the estate of the deceased child, subject to the dispositions of his will and to his debts.

VII. We now approach the most questionable part of the statute, the construction clauses (*s*): questionable, both as regards the general expediency of legislating on such subjects, and as regards the frame of these clauses in particular. An Act of Parliament is but a blind expositor of legal instruments—objects too minute for its comprehensive vision; and the interpreting, for all future testators, of a few phrases, gleaned from by-gone cases of ignorance and mistake, seems not less unbecoming the dignity, than it is foreign to the functions of a great legislative body. In framing documents, for which the legislature has evinced such critical anxiety, we shall be apt, either to lose sight of the enacted signification, or to be perplexed between our preconceived notions of the force of a word and its statutory sense. Happily, this novel interference with the rules of construction is limited to a few instances. The conflict of legal doctrines with popular opinion, on one or two

VII. AS TO THE CONSTRUCTION OF WILLS. The policy of legislating on such matters questioned.

Grounds of complaint against the old law.

(*r*) In such cases, if the testator, by a codicil, revokes the gift as to one member of the class, the others take the whole (*Shaw v. M'Mahon*, 4 Dr. & War. 431); see also *Humble v. Shore*, 7 Ha. 247; 1 H. & M. 550, n.; *Boulcott v. Boulcott*, 2 Drew. 25; *Ramsay v. Shelmerdine*, L. R., 1 Eq. 129.

(*s*) Sects. 29, 30, 31.

of the questions of construction to which this branch of the statute extends, was certainly to be deprecated, not only because the rule of law often disappointed the intention, but because the conviction that it did so produced in judges a strong disposition to find some plausible excuse for departing from the strict construction. Hence arose the numerous cases in which devisees, without words of limitation, were held to pass the fee, when combined with circumstances affording an inference that the testator meant to give a larger interest than an estate for life, as the use of the word "estate," the imposition of a charge on the devisee, or the introduction of a devise over in the event of the prior devisee dying under age. Hence, too, arose the cases, almost as numerous, in which the question was, whether, in the construction of gifts to take effect on the failure of issue, indefinitely, of a given person, the words referring to the failure of issue were, by force of the context, restrained to import a leaving of issue at the death of that person, or at some other period, within the limits of the rule against perpetuities.

General devise passes leaseholds and copyholds.

The rule (*t*) that a general devise does not pass leaseholds for years, where there are freeholds to satisfy it, is abolished (*u*). The enactment extends to copyholds, but unnecessarily; it having been held that, since the statute which dispensed with a surrender to the use of the will (*x*), copyholds would pass under a general devise (*y*), as they would have done before that statute when preceded by such a surrender.

Indefinite devise passes the fee.

The rule which required that an intention to give to a devisee an estate in fee, as distinguished from an estate for life, should be indicated by words of limitation, or by some equivalent expression (*z*), is likewise abolished; so that now a devise of a "messuage" or a "close of land" to J. S., without more, will pass the fee, unless a contrary intention appear (*a*).

Construction of words importing a failure of issue.

The statute also provides, that words referring to a failure of issue shall, unless the context require a different construction,

(*t*) *Rose v. Bartlett*, Cro. Car. 293.

(*u*) Sect. 26. But see *Wilson v. Eden*, ante, p. 48.

(*x*) 55 Geo. 3, c. 192.

(*y*) *Doe v. Ludlow*, 7 Bing. 275.

(*z*) See *Doe v. Clarke*, 1 Cr. & M. 39.

(*a*) Sect. 28.

be held to import a failure of issue at the death, and not, as heretofore, a failure of issue at any, the remotest period (*b*). The effect of this statutory modification of the rule may be illustrated, in regard to both real and personal estate, by the simple case of a gift of real and personal estate to A., and if he shall die without issue, then to B. in fee; here supposing the will to have been made before the first of January, 1838, when the statute came into operation, A. would take (the words "without issue" being construed, according to the old law, to import an indefinite failure of issue), an estate tail in the real estate (*c*), with remainder to B. in fee, while the whole interest in the personal estate (which is incapable of an entail) would belong to A. absolutely (*d*). Whether, therefore, A. had any issue or not, the gift to B. would fail, as regards the personal estate; and it might, by the act of A., *i. e.* his enrolled conveyance (*e*), be defeated, as regards the real estate. If, however, the gift in question occurred in a will made on or after the first day of January, 1838, then (the words "without issue" being construed, according to the new law, to refer to a leaving of issue at the death) A. would take the fee of the real estate, and the whole interest in the personal estate, but defeasible, as to both, by his dying without leaving issue living at his death, in which event B. would become entitled, by way of executory devise or executory bequest, notwithstanding any act of A.

Old law.

New law.

The provisions for ascertaining the effect of devises to trustees (*f*) are of a purely technical character. They were intended to relieve the expositors of wills from a most embarrassing portion of their duty. The doctrine, that no greater quantity

Construction of devises to trustees.

(*b*) Sect. 29.

(*c*) *Doe v. Ellis*, 9 Ea. 382.

(*d*) *Donn v. Penny*, 19 Ves. 545.

(*e*) 3 & 4 Will. 4, c. 74 (*England and Wales*); 4 & 5 Will. 4, c. 92 (*Ireland*).

(*f*) Sects. 30, 31. Where, by a will dated before 1838, the fee is devised to trustees, their heirs and assigns, upon trust for A., but without words of limitation, A. will take the fee (*Moore v. Cleghorn*, 10 Be. 423, aff., 12 Jur. 591; *Smith v. Smith*, 11 C. B., N. S. 121; 10 W. R. 18); but under a similar limitation in a deed A. would take only an estate for life (*Holliday v. Overton*, 14 Be. 467; 15 Be. 480; *Lucas v. Brandreth*, 28 Be. 274; *Tatham v. Vernon*, 29 Be. 604).

of legal estate should be taken by trustees, under an indefinite devise, than was sufficient for the purposes of the trust (*g*), though bearing *primâ facie* the appearance of reason, rendered it nearly impossible to say, without a judicial decision, what quantity or quality of legal estate was, in certain cases, actually vested in them; and though, in some of the reported cases (*h*) it may have been decided negatively, that the whole fee was not vested in the trustees, yet it would be difficult to express, by any technical phrase, what precise estate they were considered to have taken. The difficulty is now transferred to the statute-book.

Operation of
the Act upon
specific de-
vises and
bequests.

As the enactment which makes testamentary dispositions speak and take effect, with respect to the property (not to the objects) comprised in them, as if the will were actually executed the instant before the death of the testator (*i*), was hardly requisite to complete the dominion over after-acquired property, both real and personal estate having been already placed (*k*) on that liberal footing whereon personal estate alone formerly stood, this enactment may be considered as having, for the most part, a distinct object, and as designed to communicate a novel effect to one species of gift, namely, specific devises and bequests, at which it seems to be tacitly aimed. Cases sometimes occurred, under the old law, in which, between the date of the will and the death of the testator, the identical subject of a specific bequest had been removed or destroyed, but other property, equally answering the description, had been substituted. In such a case without a republication of the will, the legatee would not, under the old law, have been entitled to the substituted property (*l*), but he will take it by the operation of the

(*g*) *Ward v. Burbury*, 18 Be. 191.

(*h*) See *Warter v. Hutchinson*, 1 B. & C. 721; 2 Br. & B. 349; and the cases there cited.

(*i*) Sect. 24.

(*k*) Sect. 3.

Distinction
between spe-
cific and pe-
cuniary
legacies.

(*l*) 1 Rep. Leg. 179. The distinction between a specific and a pecuniary bequest is marked and important. Thus, the bequest of a debt, or a sum of money or stock, or a watch, ascertained and distinguished from the mass of the personal estate—as a bequest of 500*l.* now due to me from A., or 500*l.* now in my desk, or 500*l.* Consols now standing in my name, or the watch which I now wear—is a *specific* legacy; but a bequest of money or

new enactment. Suppose, for example, that a testator, possessed of a leasehold house in the parish of M., should bequeath "my leasehold house in the parish of M.," and should afterwards renew the lease, or sell the house and purchase another leasehold house in the same parish, the renewed lease, or the after-purchased house, though of much greater value, would pass, without any republication of the will, or other equivalent act. The same principle holds with respect to specific devises and bequests generally. If the very subject of property should be gone, but the testator should have, at the time of his death, another subject to which the words apply, that subject will pass; the statute imputing to the testator an intention to make this new application of his words, unless he manifests a contrary intention on the face of the will. But as the clause in question might be productive of some singular, and even absurd, results, if extended to all specific gifts, it will probably be subjected to exceptions and qualifications, tending to confine it to cases in which the operation of the old law was generally acknowledged to be destructive of the intention. In the meantime, a testator, intending that a specific gift shall pass no other subject of property than that which answers the description at the execution of the will, should make such his intention apparent (*m*).

In these accessions to the testamentary power, and changes in the rules of construction, however important, there is nothing to excite apprehension in the mind of the draftsman, lest, by essentially affecting the forms of wills, they should oblige him to unlearn the old, and acquire a new testamentary language. They may, on the one hand, dictate caution in regard to the intended scope of general, as well as of specific, devises and

As to the effect of the new law with regard to the forms of wills.

value merely, as, of 500*l.* sterling, or 500*l.* Consols, or a gold watch, is a *pecuniary* or general legacy. The specific legatee, who (subject, of course, to the paramount claims of creditors) can at once fasten upon the particular thing, as being identified and appropriated by the testator himself, is preferred to the pecuniary legatee, who can only claim satisfaction in amount or value out of the personal estate at large. It follows, that, if the specific thing be gone before the gift takes effect, the specific bequest must, from its very nature, wholly fail: while the pecuniary legacy will be paid in full, abate, or fail, according to the adequacy or inadequacy of the general assets.

(*m*) See *ante*, pp. 44, 45.

bequests; and, on the other hand, induce the framers of wills either to withdraw their attention from some points which have hitherto exercised it (such, for instance, as the expressing, in general or residuary devises or bequests, of an intention to exercise general powers of appointment; the mention of leaseholds in a general or residuary devise, intended to comprise lands of that tenure; and the insertion of words of limitation in devises intended to pass the fee); or to direct their attention to those points from other motives, or for other purposes. As, under the new law, the consequence of silence, in these instances, will be to pass the subject of the power, the leaseholds, or the fee, a contrary intention, if entertained, should be distinctly expressed. And it is always to be remembered, as a reason for not too hastily discarding any of the existing forms, that the context of the will may raise an argument for excluding the application of the rules of construction propounded by the legislature (*n*).

As to wills made before the Act came into operation.

It is important to bear in mind, that the Act applies, even as regards the construction of wills, only to wills made, re-executed or revived on or after the 1st of January, 1838 (*o*); so that the old and the new law must continue to divide the attention of the practitioner for a considerable period. But it has been decided, that a will executed before 1838, cannot be revoked by obliterations made since the recent statute, unless such obliterations be authenticated by re-execution and attestation in the manner prescribed by the 21st section (*p*). It is convenient that the applicability of the new law should depend on a fact apparent on the face of the will, as it does where the

Testator's meaning to be gathered from the will as a whole.

(*n*) A testator's meaning and intentions are to be gathered from the whole of his will taken together, and those intentions will be carried out by the Court, even though some expressions have to be discarded or modified, and others to be supplied by implication (*Towns v. Wentworth*, 11 Moo. P. C. 526). And in order to determine a testator's meaning, the Court must read his language in the sense which he himself appears to have attached to it; with this qualification, that when a rule of law has affixed a certain determinate meaning to technical expressions, that meaning must be given to them, unless the testator, by his will, has excluded beyond all doubt such construction (*id.*).

(*o*) Sect. 34.

(*p*) *Brooke v. Kent*, 3 Moo. P. C. 334; 2 Cur. 343.

time of making the will is correctly indicated by its date (and the correctness of the date would be presumed, in the absence of evidence to the contrary), and not on the period of the death of the testator, or on any other extrinsic circumstance. But though the Act affects only wills made on or subsequently to the 1st of January, 1838, yet wills made before that time may, by the effect of re-execution on or after that day, or of an express or implied re-execution by a codicil executed on or after that day, or, if the will should have been revoked, of an express revival (*q*) by a codicil executed on or after that day, be brought within the operation of the Act, and be consequently subjected to the new rules of construction. The operation of a general, and of a residuary devise, contained in a will executed in December, 1837, and re-executed in January, 1838, is, therefore, enlarged, so as to embrace all after-purchased estates, and all estates comprised in lapsed and void devises, to carry leaseholds for years, and to execute all general powers of testamentary appointment vested in the testator at the time of his decease. The re-execution of the will, or the execution of the codicil, must, of course, observe all the requisites of the statute in regard to the execution of wills. It has been decided, that a codicil, made since the Act, to a will made before the Act, has the same effect as if the testator had, at the date of the codicil, made a new will in the very words of the old will (*r*), except so far as its effect may be varied by the codicil; and a second codicil, duly executed and attested, referring to and identifying a former unattested codicil, was held a due execution of such former codicil (*s*).

The statute expressly excludes Scotland from its purview (*t*); and, by the general law, such of our colonial dependencies as have not imported or adopted the statute, either generally, as part of the laws of England, or specially, are also unaffected by its operation (*u*).

Colonies not within the statute.

(*q*) Sect. 22.

(*r*) See *ante*, p. 53.

(*s*) *Re Smith*, 2 Cur. 796. See notes to Prec. XXVI., *post*.

(*t*) Sect. 35; *ante*, p. 59.

(*u*) By 27 Hen. 8, c. 26, s. 2, it is enacted that the laws of England, and no other, shall be used in Wales; and the 20 Geo. 2, c. 42, s. 3, enacts that where, in any Act of Parliament, England only hath been or shall

Countries to which Acts of Parliament apply.

The statute does not apply to a *donatio mortis causâ* (v).

These observations do not profess to exhaust the subject. They purposely leave many points, of secondary interest,

be mentioned, the same shall be deemed to include the dominion of Wales and the town of Berwick-upon-Tweed. By the Act of Union, 5 Ann. c. 8 (Art. 18), the laws relating to trade, customs and the excise, are the same in Scotland as in England, but all the other laws of Scotland remain in force, subject, of course, to alteration by the Parliament of the United Kingdom. Acts passed since the Union extend to Scotland, unless that country be expressly excepted. By the Act of Union with Ireland, 39 & 40 Geo. 3, c. 67 (Art. 8), it was enacted that all the laws of each kingdom should remain as already established, but subject to alteration by the united Parliament. Acts passed since the Union extend to Ireland, unless that country be expressly excepted. To the Isle of Man, and the Channel Isles, Acts extend only when those islands respectively are specially mentioned. With respect to the Colonies, a distinction must be made between colonies proper, *i. e.* those acquired by occupancy, and those acquired by cession or conquest. Where colonies are acquired by occupancy, all Acts passed before the occupation come into force immediately upon that event, as part of the general law of England (so far, at least, as the provisions of the Acts are suitable to the social circumstances of the colony); but colonies gained by cession or conquest remain subject to their own pre-existent laws, and are not in general affected by statutes of the United Kingdom passed before their respective acquisition. But both these classes of colonies stand upon the same footing in respect of laws passed after their acquisition: while subject to other legislative authority (whether of the Sovereign in Council or of a local Council or Assembly), the Colonies generally are not affected by Acts of Parliament of the United Kingdom passed after their respective acquisition, unless they are mentioned in the Act by name or by general description.

To recapitulate. Acts of the Parliament of the United Kingdom of Great Britain and Ireland apply and extend to England, Wales, Scotland, Ireland, and the adjacent isles (except Man, and the Channel Islands), unless any of these portions of the kingdom be expressly excluded. But such Acts do not apply or extend to the Colonies, the Isle of Man and the Channel Isles, unless these dependencies are, either collectively or by name, expressly included. See further, on this subject, 1 Ste. Com., Introd. sect. 4; 2 Jarm. Byth. 398; the Appendix to Burton's Compendium; and 4 Dav. Conv. by Waley, 267.

(v) 1 Rep. Leg. ch. 1; *Moore v. Darton*, 4 De G. & S. 517. But where the circumstances indicate an intention to make a testamentary gift, and the intention fails for want of proper attestation, a *donatio mortis causâ* will not be presumed (*Re Patterson*, 12 W. R. 941). See also the notes to *Ward v. Turner* (2 Ves. 431), in 1 Wh. & Tud. L. C. Eq. 816; *Hewitt v. Kaye* (L. R., 6 Eq. 198).

Wales.
Berwick-
upon-Tweed.

Scotland.

Ireland.

Isle of Man.
Channel
Isles.
Colonies.

Recapitula-
tion.

*Donatio
mortis
causâ.*

wholly untouched. But they exhibit (or they have failed of their object) the broad features of the new law—much less, indeed, than it behoves the professional adviser to learn and meditate, but all, or nearly all, that it concerns the general reader, and even the general practitioner, to know. Though we have hazarded strictures, in regard to some points, on both the policy, structure and language of the legislative provisions, yet, looking at the statute before us as a whole, and casting a retrospect on the narrowness and incongruities of the old law, we accept the change as a national gain; neither undervaluing the difficulties of those who assume the weighty cares of legislation, beneath which even the Atlantean shoulders of an *Eldon* faltered (*x*), nor unmindful of the duty that binds every citizen to abstain from lightly impugning the laws, which, called into existence by the voice of a free state, naturally lean for support upon public opinion.

We may now close, not unprofitably, we trust, our view of this statute, by suggesting that testators should reconsider their wills, from time to time, as important changes affect the state of their property or the objects of their bounty, and rather endeavour to provide for events as they arise, than rely on the prospective care either of themselves or of the legislature (*y*); by deprecating, as more or less perilous, all attempts to engraft alterations of intention on previous testamentary papers, whether by interlineation or obliteration, or by codicil, especially on such papers as were executed under the old law, and all attempts to incorporate, by reference, the contents of ledgers, journals, or other detached writings (*z*); by cautioning both testators and

(*x*) Every chancellor and judge, who has figured as a legislator, though urged and assisted by experience and observation of the mischief to be remedied, has more or less miscarried. This is not an argument against all attempts to amend our statute laws, but it teaches us that all positive law is, from the infinite combinations of human events and the infirmities of language, necessarily defective; while judge-made law is fertile in expedients, and flexible in expression; and that the legislature, therefore, should confide, as much as possible, in the adaptive powers of the judiciary.

Statute law
and judge-
made law
compared.

(*y*) Sects. 32, 33.

(*z*) See *Utterton v. Robins*, 1 A. & E. 423; and the cases there cited. See also *ante*, p. 12.

their advisers against the too confident assumption of the responsible, morally responsible, office of a will-maker, in cases of magnitude and difficulty, which often try the gravest experience; by urging upon unprofessional persons the good sense, duty and economy of taking regular advice, in a matter that involves, perhaps, all their hard-earned gains, all their tenderest affections—nor less upon professional men, who may have acquired some repute by framing or advising on the wills of others, the folly of jeopardizing it by making their own (*a*); and, if (we may be allowed to mingle, yet further, morals with our law), by condemning all whimsical, ostentatious and splenetic schemes of disposition,—the singularity which departs from ordinary and approved modes where nothing peculiar exists; the vanity which, regardless of near and known connections, provides for remote generations a vast estate and an obscure name (*b*); the charity which reserves itself for posthu-

(*a*) See *Medlycott v. Jortin* (2 Br. & B. 632); a case upon Mr. Serjeant *Hill's* will, which was so singularly confused, that, but for the respect due to the very learned Serjeant, it might, not unreasonably, have been held void for uncertainty. The will of Sir *Samuel Romilly* was also inartificially penned, and that of Chief Baron *Thomson* was the subject of Chancery proceedings. So also were the wills of *Holt*, C. J. (*Viner's Ab., Apportionment*, p. 18), *Eyre*, C. J. (*Gower v. Eyre*, G. Coop. 156), Mr. Serjeant *Maynard* (*Earl of Stamford v. Sir John Hobart*, 3 Br. P. 31), *Vernon*, the eminent Chancery Counsel (*Acherley v. Vernon*, 1 P. W. 783; 3 Br. P. 107), Mr. Baron *Wood* (*Baker v. Bayldon*, 31 Be. 209), Mr. Justice *Vaughan* (*Knight v. St. John, coram Wood*, V.-C., 1862), *Francis Vesey*, Jun., the reporter (*Vesey v. Vesey, coram Kindersley*, V.-C., 1862), and *Richard Preston*, the conveyancer (*Whyte v. Preston, coram M. R.*, 1862). *Saunders*, C. J., appears to have made a speculative devise, upon the validity of which his executors, *Maynard*, *Holt* and *Pollexfen*, all great lawyers, were divided in opinion (4 R. P. Com. Rep. App. 24). The will of *Bradley*, the celebrated conveyancer, was set aside by Lord Thurlow for uncertainty (*Martin's Conv. Recital Book*, 35, n.). And a late learned Master in Chancery directed the proceeds of his estate to be invested in Consols *in his own name*. See also 7 No. Cas. 377; 2 Rob. 140; *Bigge v. Bigge*, 9 Jur. 192.

(*b*) The most remarkable modern instances are afforded by the wills of *Thellusson* (see *Thellusson v. Woodford*, 4 Ves. 227, 11 Ves. 112; *Oddie v. Woodford*, 3 M. & C. 584; *Thellusson v. Robarts*, 5 Jur., N. S. 717; *Thellusson v. Rendlesham*, 7 H. L. C. 429), and *Bengough* (*Bengough v. Edridge*, 1 Sim. 173; *Cadell v. Palmer*, 10 Bing. 140, 7 Bli., N. S. 200).

mous admiration; resentments that sleep not in the grave; finally, addressing to all who have disposable property (and who has not personal property?) this admonition—to settle their affairs at leisure and in health, while there is yet a sound mind in a sound body, that so they may die, not only testate, but advisedly, justly and wisely testate.

With respect to Thellusson's scheme, the enormous accumulation once anticipated, which seemed almost to threaten the equipoise of the state, vanished in Chancery management, &c.; and as Parliament had interposed by a public Act (39 & 40 Geo. 3, c. 98), to limit accumulation, so it interposed by a private Act (3 & 4 Will. 4, c. xxvii), to correct, in some degree, the particular mischief. Bengough's will (which was settled by the late Mr. *Preston*, and contained directions for a funeral with civic honours and a costly monument,) was established, after a vigorous contest, by a judgment of the House of Lords (7 Bli. 200).

Copies of the wills of several celebrated persons will be found in "Wills from Doctors' Commons, 1495—1695," edited by Jno. Gough Nichols and Jno. Bruce, printed for the Camden Society, 1863; in the preface of which the editors say, "Our best genealogical works (as, for example, Dugdale's *Baronage*) are built upon the wills and public records, and could never have been written without them, whilst the several public collections of wills are esteemed among the most useful of our antiquarian publications; witness the *Royal and Noble Wills*, edited by Dr. Ducarel and Jno. Nicholls, 1780, 4to.; the *Testamenta Vetusta* of Sir Harris Nicolas, 1826, 2 vols., royal 8vo.; the *Wills from the Registry of Bury St. Edmund's*, edited by Mr. Tymms for the Camden Society, 1850, 4to.; the *Durham Wills*, edited by Dr. Raine and the Rev. H. Greenwell for the Surtees Society, 2 vols., 1835 and 1860, 8vo.; the *York Wills*, edited for the same Society also by Dr. Raine and the Rev. James Raine, 2 vols., 1836 and 1855, 8vo.; the *Richmondshire Wills*, also edited for the same Society by the Rev. James Raine, 1853; and the *Lancashire and Cheshire Wills*, edited by the Rev. G. J. Piccope for the Chetham Society, 1857, 4to."

There is also an interesting article on the Wills of the Kings of England in the *Quarterly Review* for 1860, vol. 108, p. 425.

signed, and was left
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and the other person
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CONCISE FORMS OF WILLS.

No. I.

WILL giving to one absolutely all the Testator's Real and Personal Estate.

THIS IS THE LAST WILL AND TESTAMENT of me, [*testator's name, residence and quality*]. I DEVISE and bequeath all the real and personal estate to which I shall be entitled at the time of my decease, unto [*devisee's name, residence and quality*], absolutely ; but, as to estates vested in me upon trust or by way of mortgage, subject to the trusts and equities affecting the same respectively. AND I APPOINT the said [*name*] sole executor of this my will, hereby revoking all other testamentary writings. IN WITNESS whereof I have hereunder (*a*) set my hand, this — day of —, 186—.

Prec. I.
—

(*Signed*)

[*Testator's signature.*]

Signed by the said testator [*name*], as and for his last will and testament, in the presence of us, present at the same time, who, at his request, in his sight and presence, and in the presence of each other, have subscribed our names as attesting witnesses (*b*).

Form of attestation.

[*Two witnesses.*]

(*a*) Until the recent statute (1 Vict. c. 26), the position of the signature was not material: by sect. 9 of that Act, it is enacted that a will "shall be signed at the *foot* or *end* thereof," but this section, so far as regards the position of the signature of the testator, was amended and explained by 15 & 16 Vict. c. 24, by which the strict interpretation placed upon that enactment by the Courts was relaxed. What is now necessary is, that it "shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will," "but no signature shall be operative to give effect to any disposition or direction which is underneath or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made." The signature at the foot of the will applies to the will as a whole, and is the only effectual signature. The signing of the other sheets is merely cautionary, to guard against substitution or interpolation. See *ante*, p. 79.

Signature of testator.

(*b*) Witnesses of intelligence and respectability should be selected, and

Prec. I.

Selection of witnesses.

preference is to be given to professional men, whose subscription of the memorandum of attestation raises a presumption that the formalities of execution have been strictly attended to (see notes to sect. 9, *ante*, pp. 17, 19, 20). Moreover, there is greater facility in finding such witnesses, if living, and in proving their handwriting, if dead. The witnesses should not be persons who, or whose wives or husbands, take any benefit under the will (see sect. 15, and the note, *ante*, p. 29).

As to sealing a will.

The Statute of Frauds did not require that a will of freeholds should be sealed; but the practice of sealing prevailed, from the consideration that the will, if sealed, might operate as an execution of a power of testamentary appointment expressly requiring a seal. The decision in *West v. Ray* (*ante*, p. 24) suggests the necessity of now affixing a seal in every case where the testator is the donee of a power, of which the exact terms are unknown to his legal adviser.

As to the execution of wills of personalty and copyholds under the old law.

Under the old law, wills of personal estate, and of copyholds, not only did not require the attestation of any witness, but even the signature of the testator was not essential; for any testamentary declaration, reduced into writing by the direction and in the lifetime of the testator, was sufficient. Hence, if a testator died in the interval between the period of his having given instructions for his will and that of its execution by him, supposing the execution to have been prevented by his death, the written instructions, in the handwriting of his solicitor or any other person, constituted an effectual will (see 2 Phillim. 213; 1 Hag. 641; 2 Hag. 490). As to the attestation of wills bequeathing stock, see 1 Geo. 1, stat. 2, c. 19, s. 12; 33 Geo. 3, c. 28, s. 15; 36 Geo. 3, c. 12, s. 16; see also *Ripley v. Waterworth* (7 Ves. 440); H. Sugd. Wills, 12; *Franklin v. Bank of England* (1 Rus. 575, 9 B. & C. 162).

Formal execution of instructions for will under new law.

The recent statute, however, by subjecting wills of every kind to the requisitions of signature and attestation, has of course deprived mere unattested instructions, in the handwriting of a third person or even of the testator himself, of all operation. It seems advisable, therefore, where a testator is *in extremis*, that the instructions should, if adequately expressed to convey his intention, be duly signed and attested according to the statute, in order to guard against sudden death or incapacity occurring before the preparation and execution of the more formal instrument.

No. II.

*WILL disposing of Real and Personal Estate in favour
of the Testator's Widow and two Adult Sons, the
Widow taking a Life Estate in the Entirety.*

THIS IS THE LAST WILL AND TESTAMENT of me, [*testator's name, residence and quality*]. I REVOKE all prior testamentary writings. I DEVISE all the real estate to which I shall be entitled at the time of my decease, except estates vested in me upon trust or by way of mortgage, UNTO and to the use of my wife [*name*] and her assigns for her life without impeachment of waste; AND after her decease To the use of my two sons [*name*] and [*name*], their respective heirs and assigns, as tenants in common in equal moieties (*a*). I BEQUEATH all the leasehold property and other personal estate to which I shall be entitled at the time of my decease unto my said wife and my said two sons Upon trust to sell and convert the same into money, and thereout to pay my debts and funeral and testamentary expenses, and to invest the clear residue thereof on such securities as my said wife and sons or the survivors or survivor of them shall think proper (*b*). And upon trust to

Devise of real estate to widow for life;

—remainder to sons equally, in fee.

Bequest of personal estate.

Upon trust to convert and invest:

—Income to widow for life;

(*a*) By "The Partition Act, 1868" (31 & 32 Vict. c. 40), the Court of Chancery is empowered, in a suit for partition, to direct a sale; and if parties interested to the extent of a moiety of the property request a sale instead of a partition (see sect. 4, which is retrospective), the parties opposing must satisfy the Court that a sale would be injurious to their interests (*Lys v. Lys*, L. R., 7 Eq. 126). The 10th section provides that the Court may make such order as it thinks just respecting costs up to the hearing; in *Landell v. Baker* (L. R., 6 Eq. 268), it was held that the Act had not altered the practice with respect to the costs of a partition suit, and consequently that, though a sale was ordered, each party must pay his own costs until the hearing. But in *Osborn v. Osborn* (ib. 338), where the defendants were infants, and a sale was directed, the costs of all parties were paid out of the estate; so also in *Miller v. Marriott* (7 Eq. 1), where the property was held in equal shares.

Partition Act, 1868. Sale instead of partition.

(*b*) Until very recently, trustees, without an express authority in the instrument creating the trust, could not safely invest trust-money otherwise than in the manner adopted by the Court of Chancery, that is, in Three

Investments by trustees.

Prec. II.

—after her
death, capital

permit my said wife to receive the income of the said investments during her life, and after her decease to divide as well

Investments
by trustees.

22 & 23 Vict.
c. 35, s. 32.

per Cent. Consols, or other Three per Cent. Government Annuities (Lewin, Trusts, 250). Usually, however, the instrument creating the trust authorized a wider choice of investments, and the presumption which arose from the silence of the author of the trust on this point has now been changed by the operation of Lord *St. Leonards'* Act (22 & 23 Vict. c. 35, s. 32), which enacts, that, "When a trustee, executor or administrator shall not, by some instruments creating his trust, be expressly forbidden to invest any fund on real securities in any part of the United Kingdom, or on the stock of the Bank of England or Ireland, or on East India Stock, it shall be lawful for such trustee, executor or administrator, to invest such trust fund on such securities or stock; and he shall not be liable on that account as for a breach of trust, provided that such investment shall in other respects be reasonable and proper."

The Act does not extend to Scotland (sect. 33). A doubt has hence been expressed whether an investment on real securities in Scotland would be authorized. It is conceived that sect. 33 does not over-ride sect. 32 to this extent, but that the reasonable construction of the two sections taken together is, that sect. 32 does not apply to the case of a Scotch trust and Scotch trustees, whilst it does apply to English or Irish trusts and trustees, and authorizes the latter to invest on real securities in Scotland. At the same time, the differences between the English and Scotch laws of realty seem to render such an investment generally unadvisable. See *Re Miles's Will* (27 Be. 579).

4 & 5 Will. 4,
c. 29 (*Lynch's*
Act).

By a previous Act, 4 & 5 Will. 4, c. 29 (*Lynch's Act*), trustees who were authorized or directed to lend money at interest on real securities in England, Wales or Great Britain, were empowered to lend the same (unless expressly restricted, sect. 5) on real securities in Ireland, with the requisition only, that, in case any minor or unborn child or lunatic should be interested, the loan should be made with the sanction of the Court of Chancery. (See *Ex parte French*, 7 Sim. 510; *Stuart v. Stuart*, 3 Be. 430; *Ex parte Lord William Pawlett*, 1 Ph. 570; *Re Kirkpatrick's Trusts*, 15 Jur. 941; *Norris v. Wright*, 14 Be. 291.) The more comprehensive power conferred by Lord *St. Leonards'* Act seems to deprive *Lynch's Act* of much practical importance; except, perhaps, in cases where the prohibition of investments authorized by the former Act is not expressed with special reference to investments, but is comprised in a general clause to the effect that the provisions of 22 & 23 Vict. c. 35, shall not be applicable to the trust in question. If the operation of Lord *St. Leonards'* Act should be expressly excluded whilst investments in Ireland are to be authorized, *Lynch's Act* should not be relied on, but the necessity for an application to the Court should be avoided by authorizing investments "on real securities in England, Wales or Ireland, but not elsewhere." That a power to invest on real security in Ireland authorizes a loan on leaseholds

the capital as the income thereof equally between my said two sons, their respective executors, administrators and assigns. I

to sons,
equally.

for lives perpetually renewable at a head rent, see *Macleod v. Annesley* (16 Be. 600). Investments by trustees.

It will be observed, that the investments authorized by Lord *St. Leonards'* Act will be lawful unless they are expressly forbidden; in other words, if it be intended to exclude investments in real securities, Bank stock, or East India stock, a negative clause to that effect must be introduced into the instrument creating the trust.

The question soon arose, whether this section was intended to act retrospectively. In *Re Miles's Will* (27 Be. 579) the Master of the Rolls held that it was prospective only, and intended by the Legislature to refer to instruments executed after the passing of the Act. By 23 & 24 Vict. c. 38, s. 12, the 32nd clause of 22 & 23 Vict. c. 35, is made to "operate retrospectively." (See *Hume v. Richardson*, 4 D. F. & J. 29). 22 & 23 Vict. c. 35, s. 32, is retrospective.
23 & 24 Vict. c. 38, s. 12.

As to Bank stock, see *Cohen v. Waley* (9 W. R. 137); *Re Langford's Trusts* (2 J. & H. 458).

The section does not apply to a case where the trust fund is already invested in Bank annuities, and the trustee has no power, independently of the Act, to vary any investment (*Re Warde*, 2 J. & H. 191).

The stat. 22 & 23 Vict. c. 39, which received the Royal Assent on the same day with c. 35, created 5,000,000*l.* of Five per Cent. Stock charged on the revenues of India; and further India stock has since been created. It was doubted whether this was India stock within the meaning of c. 35; see *Re the Colne Valley and Halstead Railway* (Joh. 528, 1 D. F. & J. 53); *Re Fromon's Estate* (8 W. R. 272). But now see 30 & 31 Vict. c. 132, s. 1. India stock.

See also, as to the Court sanctioning an investment of trust-money on railway debentures, *Re Simson's Trusts* (1 J. & H. 89).

The Act 23 & 24 Vict. c. 38, also renders it lawful (see sect. 10) for the Lord Chancellor, &c., "to make such general orders from time to time as to the investment of cash under the control of the Court, either in the Three per Cent. Consolidated or Reduced or New Bank Annuities, or in such other stocks, funds or securities," as he shall see fit. And the 11th section enacts that, "When any such general order as aforesaid shall have been made, it shall be lawful for trustees, executors or administrators, having power to invest their trust funds upon government securities, or upon parliamentary stocks, funds or securities, or any of them, to invest such trust funds, or any part thereof, in any of the stocks, funds or securities in or upon which by such general order cash under the control of the Court may from time to time be invested." 23 & 24 Vict. c. 38, s. 10.
Sect. 11.

By the Order of the 1st February, 1861, "Cash under the control of the Court may be invested in Bank Stock, East India Stock, Exchequer Bills, Order of 1st Feb. 1861.

Prec. II.

Devise of
trust and

DEVISE all real estates which at the time of my decease shall be vested in me upon trust or by way of mortgage unto and to the

Investments
by trustees.

and 2l. 10s. per Cent. Annuities, and upon mortgage of freehold and copyhold estates respectively in England and Wales; as well as in Consolidated 3l. per Cent. Annuities, Reduced 3l. per Cent. Annuities, and New 3l. per Cent. Annuities." See *Equitable Reversionary Interest Society v. Fuller* (1 J. & H. 379), affirmed on appeal by Lords Justices; *Bishop v. Bishop* (9 W. R. 549). It is apprehended that the Bank stock referred to in this Order is stock of the Bank of England only, and not Irish Bank stock.

It has been thought open to question whether the power of investment conferred by the last-mentioned Act and the General Order can be controlled by express prohibition (see 3 Dav. Conv. by Waley, 190). The presumable object of the statute is to give trustees increased facilities for carrying into effect the intentions of the author of the trust; and it is submitted that the Act ought not to be so construed as to enable trustees to disobey and set at defiance the express instructions of such author: in other words, that an express prohibition of the statutory power would be operative and effectual.

If the trust fund be in Court, though it is competent to, it is not obligatory on, the Court, to make any transfer, and it would seem that special circumstances are required to induce the Court to vary the investment, as *e. g.* family exigencies which render it desirable for children entitled in remainder that their parent's income should be presently increased (*Cockburn v. Peel*, 3 D. F. & J. 170). See also *Ungless v. Tuff*, 30 L. J., Ch. 784; *Wall v. Hall*, 11 W. R. 298; *Hurd v. Hurd*, 11 W. R. 50; Lewin, Trusts, ch. 14, sect. 4; 4 Dav. Conv. by Waley, 33. But in a proper case the Court will exercise the statutory power of varying investments, notwithstanding the opposition of the remainderman (*Mortimer v. Picton*, 3 N. R. 338; and see *Vidler v. Parratt*, 4 N. R. 392).

23 & 24 Vict.
c. 145, s. 25.

A further statutory power of investment was given by the 25th section of Lord Cranworth's Act (23 & 24 Vict. c. 145), whereby it is enacted that "trustees, having trust money in their hands which it is their duty to invest at interest, shall be at liberty, at their discretion, to invest the same in any of the parliamentary stocks or public funds, or in government securities," with power to call in trust funds invested in any other securities than as aforesaid, and also from time to time to vary the investments for others of the same nature: "Provided always, that no such original investment as aforesaid (except in the Three per Cent. Consolidated Bank Annuities), and no such change of investment as aforesaid, shall be made where there is a person under no disability entitled in possession to receive the income of the trust fund for his life, or for a term of years determinable with his life, or for any greater estate, without the consent in writing of

use of my said wife [*name*] and sons [*names*], their heirs and assigns, subject to the trusts and equities affecting the same es-
 mortgage
 estates.

such person." This enactment, though posterior in date to, is far less extensive than, the statutory provisions previously mentioned; and, consequently, reference to it seems requisite only for the purpose of pointing out that, as an investment clause, it is, in fact, inoperative.

Lastly, the 30 & 31 Vict. c. 132, s. 2, empowers "every trustee, executor or administrator to invest any trust fund in his possession or under his control in any securities the interest of which is or shall be guaranteed by Parliament to the same extent and in the same manner as he may invest such trust fund in" India stock.

The result seems to be that trustees, having trust moneys to invest, acting *bonâ fide*, and not being expressly prohibited in the instrument creating the trust, are at liberty to invest in any of the following kinds of investment, viz:—Consolidated 3 per Cents., Reduced 3 per Cents., New 3 per Cents., 2½ per Cent. Annuities, Exchequer bills, or other parliamentary stock, public funds or government securities, East India stock, stock of the Bank of England or the Bank of Ireland, mortgage of freehold or copyhold estates in England, Wales, or Ireland, or on real securities in any part of the United Kingdom, or in any securities the interest of which is guaranteed by Parliament.

This wide range renders it desirable in most instances to insert a prohibition against investments in some of the above-mentioned securities; on the other hand, cases will frequently occur where a still more extended range may with propriety be allowed; but even in those cases it must be borne in mind that an express exclusion is requisite of any of the above-mentioned securities in which the creator of the trust does not intend his trust fund to be invested.

Where the instrument creating the trust confers upon the trustees "a general power to invest trust moneys in or upon the security of shares, stock, mortgages, bonds or debentures of companies incorporated by or acting under the authority of an Act of Parliament, they may invest such trust moneys on the security of mortgage debentures duly issued under and in accordance with the provisions" of the "Mortgage Debenture Act, 1865," (28 & 29 Vict. c. 78). See section 40.

By the "Stock Certificate Act, 1863," additional facilities are given to the holders of public stock, by entitling every person inscribed in the books of the Bank of England or Ireland as a proprietor of stock to obtain a certificate or certificates of title thereto, or to any part thereof, having annexed coupons entitling the bearer to the dividends payable in respect thereof. Similar facilities are given to the holders of India stock by the 26 & 27 Vict. c. 73. But by the 4th section of each of these Acts it is enacted, that "no trustee of any share in the said stocks shall apply for or hold a

Investments
by trustees.

30 & 31 Vict.
c. 132, s. 2.

28 & 29 Vict.
c. 78, s. 40.
Mortgage
debentures.

26 & 27 Vict.
cc. 28, 73.
Stock certifi-
cates.

Restriction as
to trustees
taking certifi-
cates of title.

Prec. II.

Appointment
of executors.

tates respectively. AND I APPOINT my said wife and sons ex-
ecutors of this my will. IN WITNESS, &c.

Investments
by trustees.

certificate of title to that share unless he is authorized so to do by the terms of his trust; and any contravention of this section by a trustee shall be deemed to be a breach of trust, and be punishable accordingly; nevertheless this section shall not impose on the Bank any obligation to inquire whether a person applying for a certificate of title under this Act is or not a trustee, nor subject them to any liability in the event of their granting a certificate of title to a trustee, nor invalidate any certificate of title if granted."

No. III.

WILL disposing of Real and Personal Estate in favour of Testator's Daughter, a married Woman, for her separate Use.

THIS IS THE LAST WILL AND TESTAMENT of me, [*testator's name, residence and quality*]. I DEVISE all my messuages and hereditaments, situate at — in the county of York (*a*),

Devise of messuages for separate use of married daughter.

(*a*) Wills devising lands in Yorkshire or Middlesex should be registered in the Registry Offices of those counties. The Registry for the West Riding of Yorkshire is at Wakefield, and was established by 2 Ann. c. 4; the Registry for the East Riding is at Beverley, and was established by 6 Ann. c. 35; the Registry for the North Riding is at Northallerton, and was established by 8 Geo. 2, c. 6. The Middlesex Registry is in Serle Street, Lincoln's Inn, and was established by 7 Ann. c. 20. The formalities attending registration vary in the different Registries, but the Acts all provide (in substance) that any devise by will of any hereditaments mentioned in any registered memorial of any deed or conveyance that shall be made after the registering of such memorial shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for value, unless a memorial of such will be registered in the manner provided by the Act. And memorials of wills registered within six months after the death of the testator dying within England or Wales, or within three years if he die upon or in parts beyond the seas, are as valid and effectual against subsequent purchasers as if the same had been registered immediately after the death; and a further time is allowed when, by reason of a contest as to the will, or other inevitable difficulty, not arising from the wilful neglect or default of the devisee, the memorial cannot be registered within the period above mentioned; but in the case of a known impediment, a memorial of the impediment should be registered. There can be no doubt that devises of trust and mortgage estates are within the Registry Acts. All the Acts require the production of the original will, or the probate thereof, at the Registry Office; but in the Middlesex Registry a regulation has long been in force that an office copy shall be accepted for the purpose of the registry. The North Riding and the Middlesex Acts provide that in case of concealment or suppression of any will or devise, no purchaser for value shall be defeated or disturbed in his purchase by any title made or devised by such will unless the will be actually registered within three years (North Riding) or within five years (Middlesex) after the death of the testator.

Registration of wills in York and Middlesex.

Trust and mortgage estates.

The Registry Acts do not extend to devises of copyholds. And the Middlesex Act does not extend to the City of London (Sugd. V. & P. 732).

Copyholds.

Prec. III.

and all other the real estate to which I may be entitled at my death, To such uses, for such estates, and generally in

The Middlesex Act, time for registration of will.

The Middlesex Act is rather differently worded from the rest ; the devise is to be void unless a memorial of the will "be registered *at such times* and in such manner as is hereinafter directed." Then sect. 8 provides, that all memorials of wills that shall be registered *within the space of six months* after the death of a testator dying within Great Britain shall be as effectual as if registered immediately after the death. Provided always (sect. 9), that in case of concealment, contest, or inevitable difficulty, if registry of the contest or impediment be made within two years after the death (or four years if the testator die beyond the seas), then registry of the will within six months after the removal of the impediment shall be sufficient. Provided nevertheless (sect. 10), that in case of concealment or suppression, a purchaser shall not be disturbed unless the will be actually registered *within five years* after the death. Upon these sections, taken together, it has been objected that a title under the will may be defeated by a conveyance by the heir-at-law to a purchaser for value without notice of the will, if the will be not registered within the period specified. It is submitted that the true construction of the Act is, that a will registered within the period fixed by the Act prevails even over a prior registered conveyance from the heir ; but that the will *may* be registered at any time, and whenever registered it will be effectual where there is no adverse title under a prior registered conveyance. An opinion to this effect was given in the earlier editions of Lord St. Leonards' V. & P., but (possibly in consequence of an article in 14 Jur. part 2, p. 267) is omitted from the later editions. In a recent case the M. R. declined to sanction an investment by trustees on mortgage of lands in Middlesex, the title to which was derived from devisees of a testator dying in Great Britain whose will was not registered within six months after his death. And in *Chadwick v. Turner* (34 Be. 634), it was held that the East Riding Act imperatively requires a memorial of the will, or of the impediment to registration of the will, to be registered within six months ; in that case the existence of the will was unknown for seven years after the testator's death, and the heir-at-law mortgaged the property ; the mortgagee had priority over the devisee.

Equitable charge, registration of.

An equitable incumbrance is within the Registry Acts, and must be registered to give it priority over a subsequent incumbrancer without notice (*Moore v. Culverhouse*, 27 Be. 639 ; *Neve v. Pennell*, 2 H. & M. 170). A judgment registered in Middlesex was held entitled to priority over an earlier unregistered judgment, notwithstanding notice ; but a mortgage registered with notice of an unregistered judgment was postponed to the latter (*Benham v. Keane*, 1 J. & H. 685, 3 D. F. & J. 318). Where two instruments are registered on the same day and at the same hour, that which is denoted by the earlier number is, in the absence of direct evidence to the contrary, presumed to have been first registered ; and such priority of registration is, in the absence of notice, sufficient to give priority of

Priority of charge, from priority of registration.

such manner as my daughter [*name*], the wife of —, shall whilst covert by will, or when discoverd by deed or will appoint; And in default of such appointment, To the use of — and — [*names of trustees*], their executors, administrators and assigns, during the life of my said daughter, Upon trust to pay the rents and profits of the said messuages and hereditaments to my said daughter for her separate use, independently of her present or any future husband, without power of anticipation, and for such rents and profits the receipts of my said daughter shall alone be sufficient discharges to the said trustees; And from and after the death of my said daughter, To the use of the person or persons, and if more than one in equal shares, his, her or their respective heirs and assigns, who at the death of my said daughter would be entitled by descent to the said messuages and hereditaments in case she had died intestate and seised thereof in fee simple by purchase. I BEQUEATH all the personal estate of which I shall die possessed Unto the said — and — [*trustees' names*], their executors, administrators and assigns, Upon trust to convert the same into money; and after payment thereof of my debts, funeral and testamentary expenses, to invest the residue in their names in or upon any of the

Bequest of personal estate upon trust to convert and invest;

charge to a mortgage posterior in date to that created by the deed so subsequently registered (*Neve v. Pennell, supra*). Registry of a judgment in the Common Pleas was held to charge lands in Middlesex only from the time of registration also in the Middlesex office (*Westbrook v. Blythe*, 3 Ell. & Bl. 737). Consequently where two plaintiffs had entered up judgments against the same defendant in the Common Pleas, and also registered their judgments in Middlesex, it was held in *Hughes v. Lumley* (4 Ell. & Bl. 274), that the plaintiff who first registered in Middlesex was entitled to priority against the defendant's lands in Middlesex, although his judgment was not registered first in the Common Pleas.

Registration of charges.

See also "A Practical Guide to the Registration of Deeds and Wills in the West Riding of Yorkshire: with the Variances in the East and North Riding and the Middlesex Register Acts," by J. E. Dibb, the learned Deputy Registrar for the West Riding.

By 25 & 26 Vict. c. 53, s. 104, the provisions of the several Acts relating to the registries in Middlesex and York cease to be applicable to any land in those counties respectively, so soon as the same land has been put upon the register established under the provisions of the Land Transfer Act, but only whilst it remains thereon. See also sect. 30 of the Declaration of Titles Act (25 & 26 Vict. c. 67).

Registry of indefeasible title.

Prec. III.

—pay income
to daughter
for her separate
use.

parliamentary stocks or public funds of the United Kingdom or India, or upon mortgage of freehold, copyhold or leasehold estates in England or Wales, or upon the debentures or debenture stock of any railway company in England or Wales, with power to vary the investments from time to time for any other or others of the kinds prescribed: And upon further trust to pay the income and annual proceeds of the said investments to my said daughter [*name*] during her life, for her separate use, independently of her present or any future husband, without power of anticipation, for which income the receipts in writing of my said daughter shall alone be sufficient discharges to my trustees: And from and after the death of my said daughter as to as well the capital as the income and annual proceeds of the said investments, UPON TRUST for such person or persons, and if more than one in such shares and generally in such manner as my said daughter shall by will appoint; AND in default of any such appointment, and so far as any partial appointment shall not extend, Upon trust for the person or persons who at the death of my said daughter shall be of kin to her, and who under the statutes for the distribution of intestates' effects would be entitled to her personal estate if she had died a widow and intestate, such persons, if more than one, to take in the shares prescribed by the same statutes. I REVOKE all prior wills, and appoint the said — and — to be executors (*b*) of this my last will and testament. IN WITNESS, &c.

23 & 24 Vict.
c. 145, s. 30.
Executors
may com-
pound debts,
&c.

(*b*) By the 30th section of Lord *Cranworth's* Act, 23 & 24 Vict. c. 145, it is enacted that "it shall be lawful for any executors to pay any debts or claims upon any evidence that they may think sufficient, and to accept any composition, or any security real or personal, for any debts due to the deceased, and to allow any time for payment of any such debts, as they shall think fit, and also to compromise, compound or submit to arbitration all debts, accounts, claims and things whatsoever relating to the estate of the deceased, and for any of the purposes aforesaid to enter into, give and execute such agreements, instruments of composition, releases and other things as they shall think expedient, without being responsible for any loss to be occasioned thereby."

This seems to render unnecessary the common clause (usually here inserted) by which executors were authorized to compound debts, and make similar arrangements relating to their testator's estate.

22 & 23 Vict.
c. 35, s. 31.

And by Lord *St. Leonards'* Act, 22 & 23 Vict. c. 35, s. 31, it is enacted that: "Every deed, will, or other instrument creating a trust, either

Prec. III.

expressly or by implication, shall, without prejudice to the clauses actually contained therein, be deemed to contain a clause in the words, or to the effect following, that is to say:—‘That the trustees or trustee for the time being of the said deed, will, or other instrument, shall be respectively chargeable only for such moneys, stocks, funds and securities as they shall respectively actually receive, notwithstanding their respectively signing any receipt for the sake of conformity, and shall be answerable and accountable only for their own acts, receipts, neglects or defaults, and not for those of each other, nor for any banker, broker or other person with whom any trust-moneys or securities may be deposited, nor for the insufficiency or deficiency of any stocks, funds or securities, nor for any other loss, unless the same shall happen through their own wilful default respectively; and also that it shall be lawful for the trustees or trustee for the time being of the said deed, will or other instrument, to reimburse themselves or himself, or pay or discharge, out of the trust premises, all expenses incurred in or about the execution of the trusts or powers of the said deed, will or other instrument.’” This Act came into operation on the 13th August, 1859.

So much of the indemnity clauses in common use as merely repeats what is expressed in the above form may now, therefore, be safely omitted.

Indemnity clause deemed to be contained in every instrument creating a trust.

No. IV.

WILL of a SPINSTER, bequeathing Charitable Legacies;
the Residue divisible between Nephews, a Niece, and
the Children of a deceased Niece.

THIS IS THE LAST WILL AND TESTAMENT of me — of —
in the county of —, spinster. I APPOINT my nephews —
and — executors of this my will. I BEQUEATH the pecuniary
legacies following (namely): To — the sum of £ —; To
&c. I BEQUEATH the charitable legacies following (namely):
To the Society for — the sum of £ —; To &c. And I
direct that the said charitable legacies be paid exclusively out
of such part of my personal estate as may lawfully be appro-
priated to such purposes, and in preference to any other pay-
ment thereout (a); And that the receipt of the treasurer for

Appointment
of executors.

Charitable
legacies.

Charitable
legacies.

(a) It is not sufficient to provide simply that charitable legacies shall be paid out of such part of the testator's personalty as may be legally applied to such purposes. (See S. Smith, Prin. Equity, 349, 355). Suppose a testator to die leaving a fund A. of pure personalty, and a fund B. of personalty savouring of the realty. In the first place, the debts of the testator, his funeral and testamentary expenses, are payable rateably out of the combined funds A. and B. (*Tempest v. Tempest*, 7 D. M. & G. 470; and see *Scott v. Forristall*, 10 W. R. 37). Suppose that, after the payment of debts and expenses, the fund A. is insufficient to pay all the legacies, both charitable and general; the Court, as a general rule, does not marshal assets in favour of a charity, and the charitable legacies will fail in the proportion of the fund B. to the combined funds A. and B. (*Philanthropic Society v. Kemp*, 4 Be. 581; *Sturge v. Dimsdale*, 6 Be. 462), notwithstanding the direction that they shall be paid out of such property as was legally applicable thereto. Where the charitable legacies are given in remainder after a life interest, the apportionment must be made according to the respective values of the funds A. and B. at the time of the testator's death (*Calvert v. Armitage*, 1 H. & M. 446). But if the testator's intention can be gathered from the will that the general legacies were to be paid out of fund B., so as to leave A. for the payment of the charitable legacies, this intention will be carried out (*Robinson v. Geldard*, 3 M. & G. 735; *Jauncey v. Attorney-General*, 3 Gif. 308; *Nichisson v. Cockill*, 2 N. R. 557; *Beaumont v. Oliveira*, L. R., 6 Eq. 534). Such an expressed intention of precedence before other legatees in respect of fund A. will not how-

the time being of the said societies respectively shall be a sufficient discharge to my executors for the said charitable legacies respectively. I DEVISE unto and to the use of my said nephews — and —, their heirs and assigns, all the real estate, and I bequeath to them, their executors, administrators and assigns, all the personal estate of which I shall die seised or possessed, Upon trust to sell, call in and convert the same into money (*b*) at such times and in such manner as my

General devise and residuary bequest.

Upon trust to convert—

ever exonerate fund A. from paying its proportion, rateably with fund B., of the debts of the testator (*Tempest v. Tempest, ubi sup.*). But by inserting a direction that the charitable legacies are to be paid out of fund A. preferably to any other payment thereout, not only the general legacies, but the debts and funeral and testamentary expenses of the testator, are thrown upon fund B., and the charitable legacies will thus fail only in the event of the testator's entire property, exclusive of fund A., being insufficient to pay his debts. It is manifest, however, that in the event of the testator's general estate proving insufficient, the effect of this direction may be to give everything to the charities, and to entirely disappoint legatees who have stronger claims upon the testator's bounty.

Charitable legacies.

(*b*) Independently of the statutes to be presently noticed, and in the absence of a clause declaring the trustees' receipts to be good discharges, persons paying money to trustees are, in equity, responsible for the due application of the money by those trustees. Exceptions to this rule exist in some cases; for example, where the money is to be applied by the trustees in the payment of debts generally, or of debts and legacies; or where the trust for sale is immediate, and the beneficiaries are not of age or not ascertained; or where the purchase-money is to be applied upon trusts requiring care and discretion (*Elliott v. Merryman*, Barn. 78, and the notes to that case, 1 Wh. & Tud. L. C. Eq. 51; Sugd. V. & P. ch. 18, pp. 658—663; Dart, V. & P. ch. 13, s. 3, pp. 384—404).

Power of trustees to give good discharges.

The Act 7 & 8 Vict. c. 76, s. 10, enabled trustees, in the absence of a receipt clause and of an express declaration to the contrary, to give good discharges. But this Act, which was operative only from the 1st January (see sect. 13) to the 1st October, 1845 (Sugd. V. & P. 657), was repealed by 8 & 9 Vict. c. 106. With respect to wills executed whilst the Act 7 & 8 Vict. was in force, it is remarked by an able writer that such wills must be construed "as having annexed to the trusts the incidents resulting from the then existing state of the law, and that the incidents of the trusts, as so defined, were not altered by the change in the law" (3 Dav. Conv. by Waley, 164).

7 & 8 Vict. c. 76, s. 10.

Repealed by 8 & 9 Vict. c. 106.

By 22 & 23 Vict. c. 35, s. 23, it is provided that the *bonâ fide* payment to and the receipt of any person to whom any purchase or mortgage money shall be payable on any express or implied trust shall effectually dis-

22 & 23 Vict. c. 35, s. 23 (13th Aug. 1859).

Prec. IV.

said trustees shall think proper: And after payment of my debts, funeral and testamentary expenses and the legacies

Trustees'
receipts.

charge the person paying the same from seeing to the application or being answerable for the misapplication thereof, unless the contrary shall be expressly declared by the instrument creating the trust or security.

Some doubt has been expressed with respect to the retrospective operation of the 23rd section of the Act (see 5 Jur., N. S. part 2, 441, 442; Watters's Treatise on the Act, 288); and, from the future tense being used throughout the section, it has been argued that its operation is prospective only (Lewin, Trusts, 240; 3 Dav. Conv. by Waley, 164); it is however to be observed, that the future tense is used with reference to the payment to the trustee, not to the creation of the trust; and *Wood, V.-C.*, in *Bennett v. Lytton* (2 J. & H. 158), said, "I am surprised that any difficulty should have been felt, my own impression being quite clear that the Act is throughout retrospective."

The 23rd section relates to payments of money by purchasers and mortgagees only, and is not so comprehensive as the receipt clause usually inserted in wills and settlements, which embraces payments and transfers of money, chattels, stock and investments to the trustees. A wider and more general power is given by the Act 23 & 24 Vict. c. 145, which, by sect. 29, provides that the receipts in writing of any trustees or trustee for any money payable to them or him by reason or in the exercise of any trusts or powers reposed or vested in them or him shall be sufficient discharges for the money therein expressed to be received, and shall effectually exonerate the persons paying such money from seeing to the application thereof or from being answerable for any loss or misapplication thereof. And sect. 34 of the same Act enacts, that the provisions contained in that Act shall (except as thereinbefore otherwise provided) extend only to persons entitled or acting under a deed, will, codicil or other instrument executed after the passing of that Act (28th August, 1860), or under a will or codicil confirmed or revived by a codicil executed after that date.

Though the 29th section refers to money only, and not to stocks, funds, shares and securities, the common form of trustees' receipt clause may without risk be held to be supplied by the Act (3 Dav. Conv. by Waley, 194, 195, 517, 562; see *contra*, Watters's Treatise, 291).

But sect. 23 of 22 & 23 Vict. c. 35, and sect. 29 of 23 & 24 Vict. c. 145, do nothing more than discharge the *bonâ fide* payer from seeing to the application or being answerable for the misapplication of the money. The payer must still ascertain, at his peril, that the payment is made to the proper person; and it is still necessary (where such is the intention) to insert an express clause to the effect that the purchaser or mortgagee shall be discharged from seeing whether the events have actually happened in which alone the power to sell or mortgage arises.

It is, however, suggested that the receipt and trustee clauses should not,

23 & 24 Vict.
c. 145, s. 29
(28th Aug.
1860).

Prec. IV.

hereinbefore bequeathed, Upon trust to divide the net residue of the proceeds of such sale, calling in and conversion into four equal shares, and to pay one of such fourth shares to my said nephew —, one other of such fourth shares to my said nephew —, one other of such fourth shares to my niece —, the wife of —, for her separate use, on her sole receipt, And to divide the remaining one of such fourth shares equally between such of the children of my deceased niece — as shall be living at the time of my death. I DEVISE all the real estates which at the time of my death shall be vested in me as mortgagee unto and to the use of my said nephews — and —, their heirs and assigns, subject to the equities affecting the same respectively. AND, lastly, I revoke all prior wills. IN WITNESS, &c.

—
and divide
the proceeds
among
nephews,
niece, and
children of
a deceased
niece.

in reliance upon the statutory power, be omitted from a will relating to property abroad or in the colonies (3 Dav. Conv. by Waley, 810; id. vol. 4, p. 269).

Trustees' receipts.

No. V.

WILL disposing of Real and Personal Estate in favour of two Sons, of whom one is an Adult and the other a Minor; giving to the Devisees a Power of Appointment over the Real Estate.—Direction to purchase a Life Annuity.

Devise of real estate to uses in favour of elder son.

THIS IS THE LAST WILL AND TESTAMENT of me, [*testator's name, residence and quality*]. I DEVISE the dwelling-house at —, in which I now reside, with the garden, orchard and the appurtenances thereto belonging, and also the pieces of land called respectively [*names*], now in my occupation, situate in the said parish of —, with the easements and appurtenances therewith usually occupied or enjoyed (*a*), to such persons, for such estates, and generally in such manner, as my elder son [*name*], by any deed or deeds, or by his last will, shall appoint (*b*),

(*a*) On the effect of the words “easements and appurtenances therewith usually occupied or enjoyed,” see *Pheysey v. Vicary*, 16 M. & W. 484; *Wardle v. Brocklehurst*, E. & E. 1058, 8 W. R. 241; *Ewart v. Cochran*, 4 Macq. 117, 10 W. R. 3; *Pearson v. Spencer*, 3 B. & S. 761; *Polden v. Bastard*, L. R., 1 Q. B. 156; *Smith v. Ridgway*, L. R., 1 Exch. 331. And as to the limits of the doctrine of the “disposition of the owner of two tenements” (Gale, Easements, 82), see *Suffield v. Brown*, 3 N. R. 340.

Advantages of reserving to a devisee in fee a power of appointment.

(*b*) The advantages of reserving to a devisee a power of appointment over real estate, instead of simply giving the property to him in fee, are that it enables the donee of the power to dispose of a freehold estate by way of appointment, exonerated from the dower of a wife to whom he may have been married on or before the 1st of January, 1834 (3 & 4 Will. 4, c. 105); and if the estate be copyhold, the insertion of the power (which it is clear may be created by will, *Flack v. Downing Coll.*, 17 Jur. 697), enables the donee to appoint to a purchaser or any other person without being admitted, and therefore without incurring the cost of the fine and fees for admittance. The appointee or nominee is considered as coming in immediately under the will (*Holder v. Preston*, 2 Wils. 400; *Beal v. Shepherd*, Cro. Jac. 199; *Rex v. Lord of Manor of Oundle*, 1 A. & E. 283; *Glass v. Richardson*, 2 D. M. & G. 660; *Regina v. Sir T. Wilson*, 3 B. & S. 201). Unless, however, the sale speedily follow the testator's decease, the lord of the manor can, by his right of seizing the land *quousque*, compel the admittance of the person or persons entitled to the legal owner-

Copyholds.

and, in default of such appointment, I devise the same unto my said son, his heirs and assigns (c). AND I DEVISE my messuage and lands situate at —, now in the occupation of [tenant] under a lease, with the easements and appurtenances therewith usually occupied or enjoyed (d), To such persons as my younger

Devise of other real estate to like uses, in favour of younger son.

ship in the meantime, either under the will or by descent (*Glass v. Richardson, ubi sup.*) To support the lord's right of seizure *pro defectu tenentis*, it has been held that there must be three proclamations at consecutive courts (*Doe v. Trueman*, 1 B. & Ad. 736). A devise, however, by an unadmitted surrenderee, confers no legal estate on the devisee (*Matthew v. Osborne*, 13 C. B. 919, 17 Jur. 696; Sw. Conc. Pr. 7); and the lord cannot, in the absence of a special custom, be compelled to accept a surrender to the uses of an appointment by deed *inter vivos* (*Flack v. Downing College*, 17 Jur. 697), though it is difficult to understand why the lord should not be bound to accept a surrender to whatever uses the law, as respects copyholds, has sanctioned. See 17 Jur. Pt. 2, p. 274.

Copyholds.

(c) According to the recent enactments regulating the law of inheritance (3 & 4 Will. 4, c. 106, s. 3), the testator's elder son will take as a purchaser under the devise, and not by descent. As to whether the devisee could disclaim all interest under the will, but retain the estate as heir—a question of importance with respect to the amount of fine payable on admittance to copyholds—see *Bickley v. Bickley* (L. R., 4 Eq. 216).

Heir in by devise.

(d) Uncertainty as to the scope of expressions descriptive of the subject of the gift, is a frequent source of difficulty in the construction of wills. Sometimes the doubt is whether the terms embrace real as well as personal estate. The words "estate" and "property" clearly extend to and comprise realty. "Estate" in a will is *genus generalissimum*, and, of its own force, without any proof *aliunde*, carries realty as well as personalty; and is not to be confined to personalty only, unless a clear intention can be gathered from the whole will, or from the way in which the word is used in the particular part in question (*Mayor of Hamilton v. Hodsdon*, 6 Moo. P. C. 76, 11 Jur. 193). And where a testator devised and bequeathed all his "estate and effects" to A., to be paid, assigned and transferred to him on his attaining twenty-one, it was held that copyholds of inheritance passed by the devise, notwithstanding the words of payment and transfer, which strictly were applicable only to personalty (*Stokes v. Salomons*, 9 Ha. 75; *D'Almaine v. Moseley*, 1 Drew. 629; *Phillips v. Beal*, 25 Be. 27). But a different decision was given in *Coard v. Holderness* (20 Be. 147), grounded on the absence in that case of the word "devise." The words "I constitute A. and B. my residuary legatees," will not give them the testator's real estate (*Windus v. Windus*, 6 D. M. & G. 549). That the words "estate" and "property" may be restrained by the context, see *Timewell v. Perkins*, 2 Atk. 102; *Doe v. Rout*, 7 Tan. 79; *Doe v. Hurrell*, 5 B. & Al. 18; *Saunderson v. Dobson*, 16 L. J., N. S., Exch. 249. What

What words embrace realty—"estate," "property."

"Estate and effects."

"Residuary legatees."

Prec. V.

son &c., [*similar limitations in favour of the younger son*];
But in case my said younger son shall die under the age of

Restraining
context.

constitutes a restraining context can only be learnt by a minute examination of the cases, which will be found to present some very nice distinctions, particularly respecting the effect of the association, with the words "estate" and "property," of terms descriptive of personalty only, and of the introduction into the devise of trusts inapplicable to real estate. But the inclination of the present day is to hold lands to pass under words capable *per se* of comprehending them, in spite of their association with words applicable only to personalty. As the word "estate," or any other term of comprehensive import, may be restrained to personalty by its more limited associates, so terms in themselves loose and ambiguous may be extended to real estate by force of the intention collected from the whole will, *i. e.* there may be an enlarging as well as a restraining context (*Wilce v. Wilce*, 7 Bing. 664; see the comments on this case in *Cook v. Jaggard*, L. R., 1 Exch. 125). Thus the words "personal estates" have been held sufficient upon the context to pass realty (*Doe v. Tofield*, 11 Ea. 246). See also 1 Jarm. Wills, ch. 22.

Enlarging
context.

Word
"lands"
comprises
what.

The word "lands" will carry houses, unless both words occur in the will, and stand in opposition. Thus, if a testator having a house and lands devises generally all his lands, the whole will pass; but if he devises his house to one, and his lands to another, the house of course will not pass under the latter devise (*Heydon's Will*, 2 And. 123). A devise of lands does not generally embrace incorporeal hereditaments, as tithes, rents, &c.; but such hereditaments would pass under a devise of lands at a particular place, if the testator had no other property answering to that locality (*Rich v. Sanders*, Sty. 261). So a devise of a particular manor has been held to include a rent issuing out of such manor, the testator having no other interest therein (*Inchley v. Robinson*, 2 Leon. 41, pl. 57). To avoid such questions, it is advisable to use descriptive terms more comprehensive than the word "lands"—such as "tenements," "hereditaments," or "real estate." As to the meaning of "personal and landed estates," see *Hoare v. Byng* (10 C. & F. 508).

"Messuage"
comprises
what.

There seems to be no material difference between the technical and popular signification of the word "messuage." Two acres of land have been held not to pass under the devise of a messuage *cum pertinentiis* (*Hearn v. Allen*, Cro. Car. 57). In another instance, a much larger quantity was adjudged to be included in a devise of "three messuages, with all houses, stables, &c., that stand upon or belong to the said messuages," by reason, it would seem, of the land having been conveyed to the testator by the description of a messuage or tenement, with the appurtenances (*Gulliver v. Poyntz*, 2 W. Bl. 726): but the case is not to be relied on, the evidence being clearly inadmissible to affect the construction. In another case, the devise of a house was held to carry land employed by the testator to raise hay and corn for his own consumption, because he had directed

twenty-one years, then I DEVISE the last-mentioned hereditaments and premises in the same manner as hereinbefore is ex-

that the devisee should be at the charge of housekeeping, servants' wages and coach horses; these horses were used to plough the land in question, and the Court considered the testator as having directed that they should continue to be so used; but in the will, as stated, there is no such direction (*Blackborn v. Edgley*, 1 P. W. 600).

The word "premises" signifies what has gone before, and therefore may, with propriety, be used in relation to any preceding subject or subjects. Thus, where a testator devised a certain messuage, and the furniture in it, to A. for life, and after his decease he gave the said messuage and premises to B., the latter devise was held to carry the furniture as well as the messuage to B. (*Sanford v. Irby*, 4 L. J., Ch. 23). See also *Doe v. Meakin*, 1 Ea. 456; *Fitzgerald v. Field*, 1 Rus. 427; *Lethbridge v. Lethbridge*, 3 D. F. & J. 523, 4 D. F. & J. 35; *Hibon v. Hibon*, 1 N. R. 532.

Questions often arise whether the word "share," or other such term, applies to one or more than one of several preceding subjects of gift: as to which see *Doe v. Stopford*, 5 Ea. 501; *Hardman v. Johnson*, 3 Mer. 347; *Doe v. Gell*, 2 B. & C. 680; *Doe v. Bowling*, 5 B. & Al. 722; *Adshead v. Willetts*, 29 Be. 358.

Local indefiniteness is always to be avoided, such as devising lands in or near a place. A devise of "all my estates in or near Latchington near Maldon," was held not to include a close which was from four to six miles from L., and was in the town of Maldon (*Doe v. Pigott*, 7 Tau. 553). In applying this and every other term of description, local or otherwise, property to which the words might have been stretched for want of a more appropriate subject, will be excluded by the existence of one more nearly answering to the term in question (*Doe v. Bower*, 3 B. & Ad. 453; *Webber v. Stanley*, 16 C. B., N. S. 698, 4 N. R. 192; *Lister v. Pickford*, 6 N. R. 243; *Smith v. Ridgway*, L. R., 1 Exch. 331; *Pedley v. Dodds*, L. R., 2 Eq. 819).

Though a testator may show by the context of his will that he uses a local appellation in a peculiar and extraordinary sense, yet this conclusion will not be adopted upon slight or equivocal grounds (*Doe v. Johnson*, 5 Nev. & M. 281).

In devising a property by name, uncertainty is sometimes produced by describing it to be in the occupation of a person, whose occupancy embraces less than the whole. In such a case, the reference to occupancy is not generally restrictive (*Goodtitle v. Southern*, 1 M. & S. 299; *Down v. Down*, 7 Tau. 343; *Doe v. Carpenter*, 16 Q. B. 181).

Indeed, it may be stated as a general rule, that words of suggestion or affirmation, added to a definite description, are not restrictive. As where a testatrix having devised all that her Briton Ferry estate, with all the manors, &c. thereunto belonging; afterwards, when describing another estate, added, "which, as well as my Briton Ferry estate, is situate in the

"Premises,"
how construed.

"Share."

"In or near
a place."

Peculiar construction of words of local description rejected.

As to reference to occupancy.

Words of suggestion and affirmation not restrictive.

Prec. V.

Power for

pressed concerning the hereditaments and premises firstly devised. AND in case my said younger son shall at my decease

county of Glamorgan." Part of the Briton Ferry estate was in Breconshire; but it was held, that the words in question did not exclude from the devise the Breconshire portion of the estate (*Doe v. Earl of Jersey*, 1 B. & Al. 550). So, where a testator devised all his lands at S., which were given him by his brother's will, it was held, that the devise was not confined to what he took by the brother's will (*Welby v. Welby*, 2 V. & B. 187). And a gift of "all my Bank stock, and foreign securities," was held not to be narrowed by the addition of the words "as invested by L., broker" (*Drake v. Martin*, 23 Be. 99); and the words "my property not in England, in the hands of my attorney W., consisting of, &c.," passed all the property abroad (*ib.*).

As to reference to locality only.

It would seem, however, that where the property is described by a reference to its locality only, and not by name, as where a testator devises all his messuages, lands, &c., at A., in his own occupation, the devise will not extend to a messuage and piece of land at A. not in his own occupation, there being a house and land at A. exactly answering to the description (*Doe v. Parkin*, 5 Tau. 321; see also *Doe v. Ashley*, 10 Q. B. 663; *Doe v. Hubbard*, 15 Q. B. 227). Sometimes the occupancy, being more comprehensive than any other particular in the description, has the effect of enlarging instead of restricting the extent of a devise (*Press v. Parker*, 2 Bing. 456). Where a testator devised an estate called D., "as now enjoyed by me," the devise was held to include closes belonging to an adjoining estate, which the testator had added to D. by removing the fences, and which were then in his occupation (*Bodenham v. Pritchard*, 1 B. & C. 350). So, under a devise of "the house I live in, and garden," stables and a yard in a ring-fence, and a coal-pen on the opposite side of the road, which were used by the testator partly for domestic purposes and partly in trade, were held to pass (*Doe v. Collins*, 2 T. R. 498). See also *Hibon v. Hibon* (1 N. R. 532). But a devise of "my capital messuage or mansion-house wherein I now live, and the buildings, gardens, grounds and appurtenances to the same belonging, or therewith used," has been decided not to comprise cottages on the opposite side of a road, and in the occupation of tenants, though the testatrix was in the habit of using the space between two of the cottages for turning her carriage (*Hougham v. Sandys*, 2 Sim. 95). See also *Josh v. Josh* (5 Jur., N. S. 225). In a recent case, a devise of a manor with the lands "thereunto belonging," was, partly by the aid of the context, extended to lands not properly parcel of the manor, though in a popular sense situate within the manor (*Doe v. Langton*, 2 B. & Ad. 680). But under a devise of lands "in the parish of C., with their appurtenances," outlying pieces in other parishes, though held with the C. lands, did not pass (*Evans v. Angell*, 26 Be. 202). A mansion, with 166 acres of land, was held to pass by a devise of "all my estate in Shropshire, called Ashford Hall" (*Man v. Ricketts*, 7 Be. 93; affirmed

Reference to occupancy.

Prec. V.

be under the age of twenty-one years, I EMPOWER AND DIRECT my executors or administrators, executor or administrator, for the time being, during his minority, to let from year to year or for any term not exceeding [seven] years in possession, at the best rent, and to manage in all respects the hereditaments hereinbefore devised to him, and to receive the rents and profits thereof, and, after payment of the incidental outgoings and expenses, to apply the net rents and profits, or an adequate part thereof, in his maintenance and education, and to invest the unapplied surplus, if any, in or upon the public funds or securities

trustees to administer the younger son's estate during minority.

nom. *Ricketts v. Turquand*, 1 H. L. C. 472), where parol evidence was admitted to show what the testator had been accustomed to consider the Ashford Hall estate.

Personal chattels are sometimes described by a reference to locality, as where a testator bequeaths the "household goods," "things," "property," or "effects," which are in and about his place of residence. A gift of "goods," "chattels," or "effects," in or about a house, it seems, in general will pass cash (including notes payable on demand, which are considered as cash), but not securities for money (*Arnold v. Arnold*, 2 M. & K. 365; *Marquis of Hertford v. Lord Lowther*, 7 Be. 1, and the cases there cited; *Jones v. Lord Sefton*, 4 Ves. 166; *Collier v. Squire*, 3 Rus. 467; *Swinfen v. Swinfen*, 29 Be. 207; 2 Wms. Exors. 1099). But see *Gibbs v. Lawrence* (9 W. R. 93).

"Goods," &c. in or about a house.

But if a testator expressly excepts any particulars to which the bequest would not otherwise have extended, such exception will have the effect of enlarging the construction. (See *Hotham v. Sutton*, 15 Ves. 319). And if in a general devise or bequest the testator introduces an exception of uncertain extent, the effect of such uncertainty is merely to neutralize the exception, and not to invalidate the disposition containing it (*Blundell v. Gladstone*, 14 Sim. 83).

Exception from bequest

A bequest of chattels and effects standing alone and unrestricted is clearly adequate to pass the whole personal estate (*Kendall v. Kendall*, 4 Rus. 370); yet, where these words are collocated with household goods, they may be and frequently are restrained to articles *ejusdem generis* (*Woolcombe v. Woolcombe*, 3 P. W. 112; *Timewell v. Perkins*, 2 Atk. 102; *Porter v. Tournay*, 3 Ves. 311; *Rawlings v. Jennings*, 13 Ves. 39; *Sutton v. Sharp*, 1 Rus. 146). But in *Gover v. Davis* (29 Be. 222), and *Nugee v. Chapman* (*id.* 291), property not *ejusdem generis* was held to be included. Again, the word "effects," though *primâ facie* comprising only personalty (*Hawkins, Constr. Wills*, 55), has been held, on the context, to pass real estate; see *Milsome v. Long* (3 Jur., N. S. 1073); and *Doe v. Tofield* (*ante*, p. 120). See further, as to the force and extent of particular words of description, 1 Jarm. Wills, ch. 24.

"Chattels and effects."

Prec. V.
—Accumula-
tion.

of the United Kingdom, or real or leasehold securities in England or Wales, (but not in Ireland or elsewhere, or in or upon any other security), and improve the same as an accumulating fund, varying the investment from time to time, as often as may be thought proper, for any other of the kinds aforesaid ; but with liberty to apply the income and, if deemed necessary, the capital also, of the same fund, for the maintenance or advancement in life of my same son ; and the same fund, or so much thereof as shall not be so applied, shall, in the event of his attainment of the age of twenty-one years, be his absolute property ; but in the event of his death under that age, shall be the absolute property of my said elder son. I DIRECT my executors to purchase, in their names, within twelve calendar months after my decease, for the benefit of my servant [*name*] an annuity of 20*l.* for her life, payable in equal half-yearly or quarterly portions, such purchase to be made, in the discretion of my executors, either from Government or any public company, or from any private person or persons, but so that the annuity, if purchased from any private person or persons, shall be well secured on real or leasehold property (*e*) ; And I direct that, until such

Direction to
executors to
purchase life
annuity.As to the
modes of pro-
viding for
the payment
of annuities.

(*e*) There are two ordinary modes of providing for the payment of annuities not charged on any specific property. One is, by directing the executors to invest an adequate sum in the purchase of stock or some other security yielding income, until the decease of the annuitant, when the fund falls into the residue ; and the other, by directing an annuity to be purchased, as in the text. The former is the more usual, and is, in general, the more eligible mode. It has the effect, however, of absorbing presently a larger portion of the capital to provide for the annuity, and is attended with this (sometimes inconvenient) consequence, that it protracts the final distribution of the residuary personal estate until the expiration of the annuity ; so that, where the testator is desirous that as large a portion of income as possible shall be immediately available for the general trusts, or where (as in the present instance) the residue is disposed of in such a manner as, independently of the annuity, to admit of a speedy distribution, it seems advisable to authorize the executors to purchase the annuity. This is, in fact, equivalent to leaving the annuitant a legacy equal in amount to the estimated value of his annuity ; for the annuitant (or, if the purchase be not made in his lifetime, his personal representative) can elect to receive the value (*Dawson v. Hearn*, 1 R. & M. 606 ; *Woodmeston v. Walker*, 2 R. & M. 197 ; *Day v. Day*, 1 Drew. 569 ; *Re Browne's Will*, 27 Be. 324). And an express declaration in the will that the annuitant shall not be allowed to have the value in lieu of the annuity, if standing alone, is in-

purchase shall be made, a like annuity shall be paid to her out of my general personal estate, in equal quarterly portions, the first portion to be paid at the end of three calendar months from my decease; And I declare that the said annuitant, or her executors or administrators, shall not be allowed to have the value of the said annuity in lieu thereof; And I further declare that in case the said [*annuitant's name*] shall do or suffer any act or thing whereby the said annuity or any part thereof shall be assigned, charged or incumbered, the same annuity shall cease to be payable to the said [*annuitant's name*], and shall thenceforth form part of my residuary estate. I GIVE to my said younger son, if he shall attain the age of twenty-one years, the sum of 2,000*l.* Consolidated Three per Cent. Annuities, to be transferred to him within three calendar months after he shall attain that age, or, if he should attain it in my lifetime, within three calendar months after my decease. I DIRECT that the legacy duty and expenses incident to the bequests of the annuity and stock legacy, hereinbefore respectively bequeathed, shall be paid out of my residuary personal estate. AS TO THE RESIDUE (*f*) of the real and personal property whatsoever and

Bequest to younger son of stock legacy.

Direction to pay legacy duty.

Residuary devise and bequest to elder son.

operative (*Stokes v. Cheek*, 28 Be. 620), for such a prohibition would not prevent the annuitant from selling or incumbering the annuity as soon as it was purchased, and it would be idle to make a purchase of that which the annuitant could immediately afterwards resell; the subsequent declaration in the text, as to cesser, is therefore necessary. But where a testator has covenanted to pay a life annuity, it does not follow, if after the death of the testator his estate is sufficient, and the payments are made, that the annuitant is entitled to require a portion of the estate to be sold for the purpose of having the value of the annuity paid (*Yates v. Yates*, 28 Be. 637).

(*f*) As to the words "residue," "surplus," "rest and residue," "remaining property," see *Bebb v. Penoyre* (11 Ea. 160); *Mayor of South Molton v. Attorney-General* (5 H. L. C. 1); *Presant v. Goodwin* (1 Sw. & Tr. 544, 36 L. T. 57); and as to a bequest of "money which may remain after payment of my debts," see *Stocks v. Barré* (Joh. 54).

Residue.

For an instance of a constructive gift of residue, see *Hodgkinson v. Barrow* (2 Ph. 579); and for a case where the words "residue of my things" were held, under the circumstances, not to comprise the whole of the testator's property, *Re Ludlow* (1 Sw. & Tr. 29).

As to the effect of exceptions in a residuary bequest, see *West v. Laking*

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wheresoever, which may belong to me at my decease, I DEVISE AND BEQUEATH the same to my said elder son, his heirs, executors and administrators, absolutely; but subject, as to pro-

Residuary or specific.

(12 Jur. 129). And as to whether a bequest is residuary or specific, see *Sargent v. Roberts* (12 Jur. 429); *Clarke v. Butler* (1 Mer. 304); *Re Kendall's Trust* (14 Be. 608); *Fitzwilliams v. Kelly* (10 Ha. 275); *Fielding v. Preston* (1 De G. & J. 443). As to the effect of the new Wills Act upon a general residuary devise, see *ante*, pp. 46, 47.

Intermediate income. Personalty.

A general residuary bequest, though contingent, carries with it the intermediate income, which does not go to the next of kin, but accumulates until the determination of the contingency (*Trevanion v. Vivian*, 2 Ves.

Personalty and realty.

s. 430). And a residuary gift of real and personal estate blended, though contingent in terms, carries the intermediate rents of the realty as well as the income of the personalty (*Genery v. Fitzgerald*, Jac. 468). But the

Specific bequest.

intermediate income arising from a specific bequest does not pass to the legatee until the period of vesting, and, pending the vesting, falls into the residuary personalty (*Wyndham v. Wyndham*, 3 Br. C. 58; *Hodgson v. Earl of Bective*, 1 H. & M. 376; 10 H. L. C. 656; *Holmes v. Prescott*, 3 N. R. 559), and is regarded as undisposed-of income merely, as between the parties entitled to the residue (*Fullerton v. Martin*, 1 Dr. & S. 31;

Realty alone.

Edmunds v. Waugh, 2 N. R. 408). An executory devise of real estate alone, which does not take effect until the happening of some contingency, does not carry with it the intermediate rents, but the same, being undisposed of, belong to the heir at law (*Hopkins v. Hopkins*, Ca. t. Talb. 44; *Hodgson v. Earl of Bective*, 2 N. R. 233).

Posthumous heir.

In *Goodale v. Gawthorne* (2 S. & G. 375), it was held by Vice-Chancellor *Stuart*, that the rents of real estate becoming due between the death of an intestate and the birth of his posthumous heir, which rents were not actually received by the presumptive heir before the birth of the posthumous, belonged on his birth to the latter. But in *Richards v. Richards* (Joh. 754), Vice-Chancellor *Wood* declined to follow *Goodale v. Gawthorne*, and held that a posthumous heir is entitled to the rents of a descended estate only from his birth, whether the intermediate rents have or have not been actually received by the presumptive heir.

See also, as to the destination of surplus or intermediate income undisposed of, *Cunningham v. Murray* (12 Jur. 547, reversing 1 De G. & S. 366); *Blackford v. Toller* (15 Jur. 979); *Marriott v. Turner* (20 Be. 557); *Lambarde v. Peach* (4 Drew. 582); *Turton v. Lambarde* (1 D. F. & J. 495).

E. I. C. stock.

And as to the destination of dividend of East India Company's stock, after death of legatee for life, which happened a few days before the half-yearly dividend became due, see *Warden v. Ashburner* (2 De G. & S. 366).

perty vested in me as trustee or mortgagee, to the trusts and equities affecting the same respectively. I APPOINT my said elder son and [*names, &c.*] executors of this my will ; AND I CONSTITUTE my said executors guardians of my said younger son during his minority. Lastly, I REVOKE all former wills. IN WITNESS whereof, I have hereunder set my hand, and I have also set my hand to each of the [*two*] preceding sheets of this my will, this — day of —, 186—.

(Signed)

[*Testator's signature.*]Signed, &c. [*ante*, p. 101.]

No. VI.

WILL of a MARRIED MAN, *giving the Income of his Property to his Wife during Widowhood; subject thereto, the Capital equally among his Children, the Children of a deceased Child taking their Parent's Share.*

Household
effects to
wife,

Real and re-
sidue of per-
sonal estate
to trustees.

Upon trust to
sell;

—and invest
the proceeds

—to pay in-
come to wife
during
widowhood ;

THIS IS THE LAST WILL AND TESTAMENT of me, [*testator's name, residence and quality*]. I bequeath to my dear wife [*name*] all the household furniture, plate, linen, china, glass, books, pictures, prints, provisions and other household effects belonging to me at the time of my death, and a legacy of £ — to be paid to my said wife out of the first moneys coming to the hands of my executors. AND as to all the rest of my estate and effects both real and personal I devise and bequeath the same unto and to the use of — and —, their heirs, executors, administrators and assigns, Upon trust to sell my real estate together or in parcels, by public auction or private contract, with power to make any stipulations as to title or evidence of title or otherwise, and to buy in at any public sale and to rescind or vary either on terms or gratuitously any contract for sale and to resell as aforesaid without being answerable for any consequential loss, And to call in and convert into money my residuary personal estate, And upon trust to invest the money arising from the sale, calling in and conversion of my said real and personal estate in the names of my said trustees, or in the names or name of the trustees or trustee for the time being of this my will, in or upon any of the public stocks, funds or securities of the United Kingdom or on real securities in England or Wales, but not elsewhere, and not in or upon any other kind of security than as aforesaid, but with power for the said trustees or trustee for the time being to vary the investments from time to time for any other or others of the descriptions aforesaid ; And upon further trust to pay the annual income of the said moneys, stocks, funds and securities to my said wife during her life if she shall so long continue my widow,

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And from and after her death or marriage again, as to the capital and income of the same moneys, stocks, funds and securities, Upon trust for my children in equal shares, the respective shares of such children to be absolutely vested on my death, and if any of my children shall die in my lifetime leaving issue, any of whom shall be living at my death, such issue living at my death shall take equally amongst them if more than one the share which their respective parents would have taken if living at my death. I DECLARE that the trustees or trustee for the time being of this my will shall have a discretionary power to postpone for such period as to them or him shall seem expedient the sale, calling in or conversion of any parts of my real or personal estate, but the unsold real estate and the outstanding personal estate shall be subject to the trusts hereinbefore contained concerning the moneys, stocks, funds and securities aforesaid, and the rents and yearly produce thereof shall be deemed annual income for the purposes of such trusts, and the unsold real estate shall be deemed to be converted as from the time of my death and be transmissible as personal estate accordingly. I DECLARE that a new trustee or new trustees of this my will may from time to time be appointed by deed by my said wife during her widowhood, and after her death or marriage again in the manner prescribed by law (a). I DEVISE all

—on her death or marriage, capital equally among children;

—issue of deceased child taking parent's share.

Power to postpone conversion.

New trustees.

Devise of

(a) By the 23 & 24 Vict. c. 145, s. 27, it is enacted that—"Whenever any trustee, either original or substituted, and whether appointed by the Court of Chancery or otherwise, shall die, or desire to be discharged from or refuse or become unfit or incapable to act in the trusts or powers in him reposed, before the same shall have been fully discharged and performed, it shall be lawful for the person or persons nominated for that purpose by the deed, will or other instrument creating the trust (if any), or if there be no such person, or no such person able and willing to act, then for the surviving or continuing trustees or trustee for the time being, or the acting executors or executor or administrators or administrator of the last surviving and continuing trustee, or for the retiring trustee, by writing, to appoint any other person or persons to be a trustee or trustees in the place of the trustee or trustees so dying or desiring to be discharged, or refusing or becoming unfit or incapable to act as aforesaid; and so often as any new trustee or trustees shall be so appointed as aforesaid, all the trust property (if any) which for the time being shall be vested in the surviving or continuing trustees or trustee, or in the heirs, executors or administrators of

23 & 24 Vict. c. 145, s. 27. Power to appoint new trustees.

Prec. VI.

—
trust and
mortgage
estates.

real estates vested in me as trustee or mortgagee unto and to the use of the said — and — , their heirs and assigns, Subject to

23 & 24 Vict.
c. 145, s. 27.
Power to ap-
point new
trustees.

any trustee, shall, with all convenient speed, be conveyed, assigned and transferred so that the same may be legally and effectually vested in such new trustee or trustees either solely or jointly with the surviving or continuing trustees or trustee, as the case may require, and every new trustee or trustees to be appointed as aforesaid, as well before as after such conveyance or assignment as aforesaid, and also every trustee appointed by the Court of Chancery, either before or after the passing of this Act, shall have the same powers, authorities and discretions, and shall in all respects act, as if he had been originally nominated a trustee by the deed, will, or other instrument creating the trust."

In wills, the power of appointing new trustees is frequently conferred upon the widow, should the testator leave one, or, if none, upon some other member or members of the family, and subject thereto, to the persons designated in the above section. If the power is not intended to be given to the widow or any other member of the family, the power contained in the Act seems to be sufficient in most cases to render unnecessary the insertion of any express power for the purpose of appointing new trustees; if required, a clause can, as in the text, be inserted in the will specifying by whom the power is to be primarily exercised, to which might be added a clause enabling the number of trustees to be increased or diminished. If the statutory power can be adopted in its integrity, there appears to be no objection to the omission of the usual power; but if some additional wish of the testator is to be engrafted upon the statutory power, it would seem to be the best course to complete the clause, and not rely upon the statute for fractional parts; the additional three or four lines being amply compensated by the clearness gained from having the whole clause upon the face of the will.

There may be some doubt as to the applicability of the Act to a will in which several sets of trustees are constituted; though the probable construction of this section would seem to be that the statutory power is annexed to each particular trust, so that the surviving or continuing trustees of each set are (in the absence of a person nominated so to do by the will) empowered to fill up vacancies occurring in that set; in which case the statute may be considered as superseding the express power in instruments appointing several sets, as well as in those constituting only one set of trustees. (See 3 Dav. Conv. by Waley, 522.)

The provision that every trustee appointed by the Court of Chancery shall have the same powers, authorities and discretions, and shall, in all respects, act as if he had been originally nominated a trustee in the instrument creating the trust, seems to confer upon trustees appointed by the Court the power of appointing new trustees; this is an alteration and an

the trusts and equities affecting the same respectively. **AND I** appoint the said — and — executors of my will. Lastly, **I REVOKE** all testamentary instruments heretofore made by me. **IN WITNESS, &c.**

improvement of the previous law. It is to be noticed also that this provision is retrospective. 23 & 24 Vict. c. 145, s. 27.

Neither the section itself, nor an appointment of a new trustee in exercise of the power thereby conferred, takes away the jurisdiction of the Court to appoint, or to increase the original number of trustees when necessary (*Viscountess D'Ahdemar v. Bertrand*, 35 Be. 19).

It is to be observed that the statute does not provide for the case of a trustee going to reside abroad.

No. VII.

WILL of a TRADESMAN, bequeathing his Business to his Widow, and appointing her sole Trade Executrix.—Residue to Trustees, to convert and invest; Income to Wife during her Life; subject thereto, Capital to Children equally; the Issue of deceased Children taking their Parent's Share.—Maintenance of Children and Grandchildren during Minority.

THIS IS THE LAST WILL AND TESTAMENT of me, [*testator's name, residence and quality*]. I GIVE and bequeath unto my dear wife [*name*] absolutely, the business of a — now carried on by me at —, and all the goodwill and stock in trade, fixtures and effects which at the time of my death shall be employed by me therein, and all moneys and debts which shall then belong and be due to me for or on account of the said business, subject nevertheless to the payment of all my debts, funeral and testamentary expenses; And I appoint my said wife sole executrix of this my will, so far as relates to the property and assets which at the time of my death shall be employed in my said business. I ALSO bequeath to my said wife absolutely all the household furniture, consumable stores and other effects which at the time of my death shall be about or belong to my then dwellinghouse. I DEVISE all the real estate and I bequeath all the residue of the personal estate to which at the time of my death I shall be entitled, or over which I shall then have any power of testamentary disposition, unto and to the use of my said wife and my two sons — and —, their heirs, executors, administrators and assigns, Upon trust to sell my said real estate together or in parcels by public auction or private contract, with power to make any special conditions as to title or otherwise, and to buy in or rescind any contract for sale and to resell without being answerable for any consequent loss, And to convert and get in my residuary personal estate, And to invest the moneys to arise from the sale,

Bequest of business, goodwill, &c., and household effects, to widow.

Real estate and residue of personal estate to trustees;

—upon trust to sell and invest the proceeds;

conversion and getting in of my real and residuary personal estate in the names or name of the trustees or trustee for the time being of this my will, in or upon Government securities of the United Kingdom, or real securities in England or Wales, with power to vary the investments from time to time, as the said trustees or trustee shall think fit, for any other or others of the securities aforesaid; AND upon further trust to permit my said wife to receive the annual income of the said moneys and investments during her life, And from and after her death upon trust for my children in equal shares; And I declare that if any child of mine shall die in my lifetime, and any child or children of such child of mine shall be living at my death, the share to which each child of mine so dying would if living at my death have been entitled under the trust aforesaid shall be held in trust for the child or children of such child of mine who shall be living at my death, and, if more than one, in equal shares; AND I empower the said trustees or trustee during the minority of any child or grandchild of mine for the time being entitled to a share of the said trust moneys and investments to apply the annual income of the share to which each such minor shall be entitled in or towards his or her maintenance and education or otherwise for his or her benefit, or in the option of the said trustees or trustee to pay the said annual income to the parent or guardian of such minor without being liable to see to the application thereof. I DEVISE unto and to the use of my said wife — and my said sons — and — all real estates which at the time of my death shall be vested in me upon trust or by way of mortgage, but subject to the trusts and equities affecting the same respectively. I REVOKE all prior wills and appoint my said wife and my said sons — and — executors of this my will (except as to my property embarked in trade) and guardians of such of my children as at the time of my death shall be under the age of twenty-one years, during their respective minorities. In WITNESS, &c. (a).

—income to wife during her life;

—capital to children equally;

—issue of deceased child taking parent's share.

Maintenance of minors.

Devise of trust and mortgage estates.

Appointment of executors and guardians.

(a) It is well known that from legal instruments punctuation and parentheses are excluded; or, if admitted, that they are disregarded in the construction of the instrument. Stops, though used in the printed copies of Acts of Parliament, are omitted from the Parliament Rolls. The

Punctuation.

Prec. VII.

Punctuation
of wills.

absence of stops from conveyances, and the framing of the sentences so as to be independent of their aid, has been attributed to the natural desire that everyone must feel that the title to his estates should not depend on so trivial a circumstance as the insertion or omission of a comma or semicolon (J. Williams, R. P. 189); while the necessity of expressing the meaning unequivocally, without the aid of such marks, has been alleged as one cause of the apparent tautology and verboseness of legal instruments

Parentheses.

(1 Jarm. Byth. 368). It would seem, however, that in construing wills, marks of punctuation occurring in the original (*Oppenheim v. Henry*, 2 Ha. 802, n.), parentheses, capital letters, &c., may be taken into consideration; see *Gascoigne v. Barker* (3 Atk. 8), *Banks v. Denshire* (1 Ves. s. 63), *Morrall v. Sutton* (1 Ph. 533), as to parentheses; *Compton v. Blowham* (2 Col. 201), *Child v. Elsworth* (2 D. M. & G. 679), *Gauntlett v. Carter* (17 Be. 586), *Manning v. Purcell* (7 D. M. & G. 55), *Jebb v. Tugwell* (Ib. 668), *Manchee v. Kay* (3 Gif. 545), as to stops, &c., and the inferences to be drawn from the state of the original instrument. See also *Pope v. Pope* (4 Ir. Ch. Rep. 66); Hawkins, Constr. Wills, 7.

No. VIII.

WILL of a MARRIED MAN leaving all his Property to Trustees for Sale and Conversion, to pay Debts and Legacies and to invest the Surplus; Income to Wife during Widowhood, charged with Maintenance of Children; Capital among Children equally at twenty-one or Marriage.—Settlement of Shares of Daughters.—Provisions for Maintenance and Advancement.—Substitution of Grandchildren for Children dying before Testator.—On Failure of previous Trusts, as Wife shall appoint; in Default, for Testator's next of Kin.

THIS IS THE LAST WILL AND TESTAMENT of me, [*testator's name, residence and quality*]. I REVOKE all prior wills, and appoint — and — executors and trustees hereof. I BEQUEATH the following legacies, that is to say, To &c. I DEVISE unto and to the use of my said trustees [*names*], their heirs and assigns, all the real estate, and I bequeath to them, their executors, administrators and assigns, all the personal estate, of or to which I shall be seised, possessed or entitled at my decease, upon the trusts and subject to the declarations following: namely, UPON TRUST to sell and convert into money my said trust estates, or such parts thereof as shall be of a saleable or convertible nature, and to get in the other parts thereof: WITH full discretionary power to sell by public auction or private contract, together or in parcels, subject to such terms and conditions as to the title, or the evidence or commencement of title, or the time or mode of payment of the purchase-money, or indemnity against or apportionment of incumbrances, or as to any other matters relating to the sale, as my said trustees shall judge expedient: ALSO to fix reserved biddings, and buy in property offered for sale, and vacate or vary contracts for sale and to resell as aforesaid without liability to answer for any consequential loss, and generally to effect the sale and conversion of my said trust estates on such terms and in such manner as they shall deem most advantageous:

Appointment
of executors
and trustees.

Bequest of
legacies.

Real and per-
sonal estate
to trustees;

—sale and
conversion;

Prec. VIII.

—discretionary power to postpone conversion ;

—interim management ;

—constructive conversion from testator's death ;

—rents, &c. to be deemed income.

Trusts of proceeds ;
—expenses, debts and legacies ;

—investment of ultimate surplus ;

—income to wife, during her widowhood ;

Also full discretionary power to suspend, for such period as my said trustees shall judge expedient, the sale, conversion or getting in of my said trust estates, or any part or parts thereof respectively, and during the suspense of the sale, conversion or getting in, to manage and order all the affairs thereof, as regards letting, occupation, cultivation, repairs, insurance against fire, receipt of rents, indulgences and allowances to tenants, and all other matters, but so that no lease shall be granted otherwise than from year to year, or for a term not exceeding twenty-one years in possession, at the most improved rent, without fine or premium : AND I DECLARE that, for the purposes of enjoyment and transmission under the trusts hereinafter contained, my said trust estates shall be considered as money from the time of my decease, and the rents, dividends, interest and other yearly produce thereof respectively to accrue due after my decease and until the actual sale, conversion and getting in thereof, shall be deemed the annual income thereof, applicable as such, for the purposes of the said trusts, without regard to the amount of such income, or to the nature of the investment or investments yielding the same : AND as to the moneys to arise from the sale, conversion and getting in of my said trust estates, UPON TRUST thereout, in the first place, to pay or retain all the expenses incident to the execution of the preceding trusts and powers, and my debts and funeral and testamentary expenses ; and, in the next place, to pay the pecuniary legacies hereinbefore bequeathed ; AND upon further trust to invest the ultimate surplus of the said trust moneys in the names of my said trustees, in or upon permanent public stocks, funds or securities of the United Kingdom, or on the security of a mortgage or mortgages of any freehold or copyhold estates in England or Wales but not elsewhere, and not in or upon any other kind of security, and from time to time with the consent in writing of my said wife, until she shall die or marry, and afterwards in the discretion of my said trustees, to vary the investment or investments of my said trust moneys for any other or others of the description contemplated by this trust, AND UPON FURTHER TRUST to pay the annual income of my said trust moneys, or the stocks, funds and securities whereon the same shall be invested as aforesaid (which moneys, stocks, funds and securities are hereinafter referred to under the denomination of “ the said trust

fund"), to my said wife during her life, if she shall so long continue my widow, she thereout maintaining, educating and bringing up in a manner suitable to their station in life such of my sons as shall, for the time being, be under the age of twenty-one years, and such of my daughters as shall, for the time being, be under that age, not having been married: AND immediately after her decease or future marriage, as to as well the capital as the annual income of the said trust fund, IN TRUST for my child, if only one, or all my children, if more than one, who, either before or after the decease or future marriage of my said wife, shall, being a son or sons, attain the age of twenty-one years, or, being a daughter or daughters, attain that age or be married, and, if more than one, to take in equal shares: BUT I declare that if such child or children, or any of them, shall be a daughter or daughters, then the said trust fund, or the share thereof to which such daughter, or each of such daughters, shall become entitled, shall be held by my said trustees upon the trusts following: namely, UPON TRUST, with the consent in writing of my daughter entitled thereto, and, after her decease, in the discretion of my said trustees, to convert the same into money, and invest the moneys to arise therefrom in or upon any of such securities as, and no other than, are hereinbefore authorized, and from time to time, with the like consent or in the like discretion, to vary the investment or investments for any other or others of the same description: AND upon further trust to pay the annual income of the same moneys, or the securities whereon the same shall be invested as last aforesaid (which moneys and securities are hereinafter referred to under the denomination of "the said settled fund"), as and when the same shall, from time to time, become actually receivable, and not by way of anticipation, into the proper hands of my same daughter, during her life, for her separate use, free from the control of any husband to whom she may be married, without power of alienation, as a strictly personal provision, for which annual income her receipts shall alone be sufficient discharges to my said trustees: And immediately after the decease of my same daughter, as to as well the capital of the said settled fund as the annual income thenceforth to accrue due for the same, IN TRUST for all or any one or more exclusively of the children and remoter issue of my same daughter (such re-

—charged with maintenance, &c., of children;

—capital to children equally.

Settlement of the shares of daughters;

—investment;

—inalienable life-interest;

—children and other issue of

Prec. VIII.

daughter, as she shall appoint;

—hotchpot;

—in default, for children equally at twenty-one or marriage;

—if no child attain twenty-one or marry

—as daughter shall by will appoint;

—in default, for daughter's next of kin.

Maintenance of testator's children;

moter issue being born in her lifetime), in such proportions, for such interests, and generally in such manner as she, whether covert or sole, shall, from time to time, by deed, with or without power of revocation and new appointment, or by her will, appoint; BUT no child in whose favour or in favour of whose issue an appointment shall be made, shall participate under the trust next hereinafter contained in the unappointed portion of the said settled fund, without bringing the benefit of such appointment into hotchpot: AND in default of appointment, and subject to any partial appointment, IN TRUST for the child, if only one, or all the children, if more than one, of my same daughter, who, either before or after her decease, shall, being a son or sons, attain the age of twenty-one years, or, being a daughter or daughters, attain that age or be married, such children, if more than one, to take in equal shares; BUT if there shall not be any child of my same daughter, who, being a son, shall attain the age of twenty-one years, or, being a daughter, shall attain that age or be married, then IN TRUST for such persons, for such interests, and generally in such manner in all respects, as my same daughter, whether covert or sole, shall by will appoint; AND in default of appointment, and subject to any partial appointment, IN TRUST for the person or persons who, at the decease of my same daughter, shall be of her blood, and of kin to her, and who, under the statutes for the distribution of intestates' effects, would be entitled to her personal estate if she were dead a spinster and intestate, such persons, if more than one, to take in the proportions prescribed by the same statutes. I EMPOWER my said trustees, during the minority of each child of mine, to apply such part as they shall think fit of the annual income of the fund or share to which such child shall be entitled or contingently entitled in possession, in or towards the maintenance and education, or otherwise for the benefit of the same child (a); and I direct them to accumulate, by invest-

23 & 24 Vict. c. 145, s. 26. Maintenance of infants.

(a) The 26th sect. of Lord *Cranworth's* Act, 23 & 24 Vict. c. 145, enacts that, "in all cases where any property is held by trustees in trust for an infant either absolutely or contingently on his attaining the age of twenty-one years, or on the occurrence of any event previously to his attaining that age, it shall be lawful for such trustees at their sole discretion to pay to the guardians (if any) of such infant, or otherwise to apply for or towards the maintenance or education of such infant, the whole or any part

ments pursuant to the trust for investment hereinbefore contained, the unapplied surplus, if any, of such income, and de-

of the income to which such infant may be entitled in respect of such property, whether there be any other fund applicable to the same purpose or any other person bound by law to provide for such maintenance or education or not; and such trustees shall accumulate all the residue of such income by way of compound interest by investing the same and the resulting income thereof from time to time in proper securities for the benefit of the person who shall ultimately become entitled to the property from which such accumulation shall have arisen: provided always, that it shall be lawful for such trustees at any time, if it shall appear to them expedient, to apply the whole or any part of such accumulations as if the same were part of the income arising in the then current year."

Maintenance
of infants.

The intention of the legislature probably was to import a maintenance clause into every instrument creating a trust in favour of infants. But the clause has not been happily selected. For it is to be observed that the infant must be "entitled" (not "entitled either absolutely or contingently on his attaining the age of twenty-one years, or on the occurrence of any event previously to his attaining that age," as in the first paragraph of the section) to the income which the trustees are authorized to apply for maintenance or education. If the word "entitled," as applied to the income, be read as equivalent to "entitled as aforesaid," the clause would authorize trustees, in their sole discretion, and in a case where the donor of the bounty was silent on the subject, to apply for the benefit of an infant money which is his only in expectancy or contingency, and which, in the event, may prove to belong to another. It has accordingly been doubted whether so sweeping and radical a change was intended by the legislature to be effected, as it were, by a side wind; and it may be that the sole effect of the clause is, that where an infant is in any event entitled to income (whatever the nature of his estate or interest in the corpus of the property), then such income may be applied by the trustees for his maintenance or education, notwithstanding that there may be other funds applicable for, or another person bound to provide, such maintenance or education. The frame of trusts usually adopted gives to infants an expectant or presumptive interest only, and there is, therefore, superadded a power to the trustees to maintain or educate the infants out of the income of their expectant or presumptive share. Such a power may not be supplied by the statutory enactment above set forth, and it would appear to be unsafe to rely upon this section, and omit the trusts for maintenance and accumulation which are usually inserted in drafts. See also 3 Dav. Conv. by Waley, 192, 193, where other objections to the 26th sect. of this Act are also referred to.

It is apprehended that there is nothing in the section to relax the rule as to the father's obligation to maintain his infant children; the power conferred upon the trustees is "at their sole discretion," but it would seem that

As to father's
obligation to
maintain his
infants.

Prec. VIII.

—advance-
ment of tes-
tator's chil-
dren, irre-
spective of
minority;

Substitution
of grand-
children for
children of
testator pre-
deceasing
him.

On failure of
previous
trusts;

—as tes-
tator's wife
shall by will
appoint;

—for tes-
tator's next
of kin.

clare that the accumulations thereof shall be liable to be in like manner applied, but, subject to such liability, shall be added, as capital, to the fund or share whence the same shall have arisen.

I ALSO EMPOWER my said trustees, with the consent of my said wife during her widowhood, and after her decease or marriage, in their discretion, and notwithstanding any of the trusts hereinafore declared of the said trust fund, to apply any part or parts, not exceeding in the whole one moiety of the capital of the fund or share to which each or any child of mine shall be entitled, or contingently entitled, in or towards the advancement in life, or otherwise for the benefit of the same child, whether such child shall be a son or daughter, or shall be under the age of twenty-one years or not. I DECLARE that if any son or daughter of mine shall die in my lifetime, and any child or children of such son or daughter shall be living at my decease, then the said trust fund, or the share thereof to which the son or each son so dying would, if living at my decease, and if then of the age of twenty-one years, or to which the daughter or each daughter so dying would, if living at my decease, have been entitled under the trusts aforesaid, shall be held by my said trustees upon such trusts, and subject to such provisions in favour of the child or children of such son or daughter respectively, as the same would have been held, if, as regards a son so dying, such son were a daughter, and had died immediately after my decease, or, as regards a daughter so dying, such daughter had died immediately after my decease; BUT in case no child or other issue of mine shall acquire an absolutely vested interest in the said trust fund by virtue of my will, then, as to the same trust fund, IN TRUST for such persons, for such interests, and generally in such manner as my said wife, she continuing my widow at her decease, shall by her will appoint; AND in default of appointment, and subject to any partial appointment, IN TRUST for the person or persons who, at the decease or future marriage of my said wife, shall be of my blood and of kin to me, and who, under the statutes for the distribu-

they ought in general to exercise their discretion in conformity with the existing rule which imposes the liability on the father when competent (see 3 Dav. Conv. by Waley, 628).

tion of the personal effects of intestates, would be entitled to my personal estate, if I were to die immediately after the decease or marriage of my said widow intestate and domiciled in England, such persons, if more than one, to take in the proportions prescribed by the same statutes. I DEVISE unto and to the use of my said trustees — and —, their heirs and assigns, All the real estates which at my death shall be vested in me as trustee or mortgagee, subject to the equities affecting the same respectively. AND, lastly, I appoint my said wife during her widowhood, and, after her death or future marriage, the said — and —, to be the guardian and guardians of my children during their respective minorities. IN WITNESS, &c.

Devise of
trust estates.Appointmen
of guardians.

No. IX.

WILL of a MARRIED WOMAN, disposing of Real and Personal Estate in favour of her Husband absolutely, subject to Pecuniary Legacies; with an Expression of her Confidence that he will leave the Property to her Relations.

THIS IS THE LAST WILL AND TESTAMENT of me [*testatrix's christian name*], the wife of [*husband's name, residence and quality*]. I GIVE all the real and personal estate of which, by virtue of any power or authority (*a*), or of any separate right

Absolute gift to husband of real and per-

Testamentary execution of power, probate of, required. But Probate Court cannot inquire into the valid creation or due execution of the power.

(*a*) The Courts, by requiring that an appointment by will of personal property, in execution of a power, shall be proved, in order to establish its testamentary character, seem to have involved themselves in much embarrassment. It is now settled, by the highest authority, that the Court of Probate must admit the instrument to probate without regard to its adequacy as an execution of the power (*Barnes v. Vincent*, 5 Moo. P. C. 201, 10 Jur. 233; *De Chatelain v. De Pontigny*, 1 Sw. & Tr. 411; *Paglar v. Tongue*, L. R., 1 Prob. 158), and has no jurisdiction to try the validity of a power in virtue of which the will is made (*Este v. Este*, 2 Rob. 351, 15 Jur. 159). The Court of Probate can alone declare a writing to be testamentary, but is not called upon to look at the power either as to its creation or execution; only it is bound to say that, assuming the testator had the power, the paper is testamentary: it has long been settled that the opinion of the Court of Probate upon the execution of the power does not conclude or satisfy the Court of Chancery (*Rich v. Cockell*, 9 Ves. 376). But, by forbidding the Court of Probate to meddle with the due execution of the power, the difficulty is not entirely disposed of; for suppose the appointable fund, in the case of a special power, to be the only subject-matter of the instrument, then, as that fund cannot be deemed assets of the testator, what is there whereon to found the jurisdiction of any probate Court? (See *Re Edwards*, 8 Jur. 154). The case of the foreign domicile is singularly anomalous. In a large proportion of cases, the grant of probate must be the judgment of a Court without jurisdiction—a gratuitous *dictum* upon a hypothetical case (see *Tatnall v. Hankey*, 2 Moo. P. C. 342). See also *Lhuart v. Harkness* (34 Be. 324); *Blaklock v. Grindle* (L. R., 7 Eq. 215).

By the Rules of the Probate Court, the power in exercise of which the will of a married woman purports to have been made must be specified in

of property (b), or otherwise, I am competent to dispose, unto my said husband, for his absolute use, subject to the

sonal estate,
subject to
legacies ;

the grant of probate; and the grant is limited to the property over which the testatrix had during coverture a power of disposition.

Prior to the passing of 23 Vict. c. 15, probate duty was not payable on the appointed fund, where the power was created by will (*Vandiest v. Flynnmore*, 6 Sim. 570), for the appointees were held to take as if they had been named in the will creating the power. But probate duty was payable when the power was created by deed (*Palmer v. Whitmore*, 5 Sim. 178). And, on general principles, a testamentary appointment is not liable to probate duty, where, at least, the testator's estate is not entitled to the fund in default of appointment, the appointable fund not being the property of the testator, and not recoverable by his executors by virtue of the probate (*Platt v. Routh*, 6 M. & W. 756, 3 Be. 257; *Drake v. Attorney-General*, 10 C. & F. 257; see also *Attorney-General v. Bouwens*, 4 M. & W. 171). But now, by 23 Vict. c. 15, s. 4, personal estate, which any person dying after the 3rd April, 1860, shall have disposed of by will, under any authority enabling such person to dispose of the same as he or she shall think fit, is chargeable with probate duty.

Probate duty
on appoint-
ment under
power created
by will.

23 Vict. c. 15.
General
power.

It may be added, that not only were the Prerogative Courts debarred from inquiring into the creation or due execution of powers, as before mentioned, but they had no jurisdiction to enter into questions of construction, though incidentally they were sometimes compelled to do so (*Burgess v. Marriott*, 3 Cur. 424). "The Court of Probate does not habitually act as a Court of construction; that is not its proper function, save in cases where it is absolutely necessary in order to determine the rights of litigant parties" (1 Sw. & Tr. 293). Even in such cases the Probate Court does not determine the rights of the parties; but its action is confined to granting probate or letters of administration, in such manner and to such persons as to the Court, on its construction of the will, seems right (see *Re Ludlow*, 1 Sw. & Tr. 29; *Re Goodyar*, 1 Sw. & Tr. 127; *Re Pile*, 2 Sw. & Tr. 628). But this incidental construction is liable to be overruled by the construction of the Court of Chancery, and in the event of any difference, the construction of the latter Court must prevail. Thus, where the Prerogative Court, putting its construction on a will, granted letters of administration to A., but the Court of Chancery held that construction to be wrong, and that B. was entitled to the grant, it was held that the proceeding in Chancery was in the nature of an appeal from the Prerogative Court, and the Court of Probate decreed grant to B. (*Warren v. Kelson*, 1 Sw. & Tr. 290). See also *Enobin v. Wylie*, 1 Sw. & Tr. 118; *Re Mundy*, 2 Sw. & Tr. 119, 7 Jur., N. S. 52; *Re De Pradel*, L. R., 1 Prob. 454.

Courts of
Probate do
not enter
into ques-
tions of con-
struction.

(b) It is clear that without her husband's consent a married woman may make a will for the purpose of appointing an executor to continue the representation of a prior testator (*Scammell v. Wilkinson*, 2 Ea. 552; *Hodsdon v. Lloyd*, 2 Br. C. 534, 543), or of bequeathing personalty settled

Will of mar-
ried woman.

Prec. IX.

payment thereout of the pecuniary legacies bequeathed by this my will, and by any codicil hereto, together with the

Married woman.

Power to devise fee settled to her separate use.

to her separate use (*Fettiplace v. Gorges*, 1 Ves. j. 46); she may also, without her husband's consent, devise or bequeath real or personal property by virtue and in exercise of a power duly created for that purpose. Until recently, there appears to have been some doubt whether, without the machinery of a power (see, however, *Atchison v. Le Mann*, 23 L. T. 302), she could effectually devise as against her heir the equitable interest in real estate settled to her separate use; or rather, whether the fee could be constituted her separate estate. In *Harris v. Mott* (14 Be. 170), the M. R. held that the separate use was to protect the wife against her husband and not to extend her power of disposition; see also *Lechmere v. Brotheridge* (32 Be. 353); and the dictum of V.-C. Kindersley in *Blatchford v. Woolley* (2 Dr. & S. 206). But it is now settled that where real estate is given to trustees in fee upon trust for the separate use of a married woman in fee (the terms of the trust being such that the separate use attaches upon the corpus, *Troutbeck v. Boughey*, L. R., 2 Eq. 534), she has the same power of disposition by deed or will over the equitable fee as if she were a feme sole (*Taylor v. Meads*, 5 N. R. 348, 34 L. J., Ch. 203). And if the legal fee be in the married woman herself, she can devise the equitable fee, and the heir at law is a trustee of the legal estate for her devisee (*Hall v. Waterhouse*, 6 N. R. 20). See also *Adams v. Gamble* (12 Ir. Ch. Rep. 102), and *Lechmere v. Brotheridge* (*ubi sup.*), as to the power of a married woman to convey by deed, without acknowledgment, real estate settled to her separate use.

Separated from her husband.

As to property acquired by a married woman voluntarily separated from her husband, and the circumstances under which it will be considered as her separate property, see *Haddon v. Fladgate* (1 Sw. & Tr. 48, 6 W. R. 456), and the cases there cited. As to the testamentary power of a woman judicially separated from her husband, see 20 & 21 Vict. c. 85, s. 25. And as to the will of a married woman deserted by her husband, and who had obtained a protection order under 20 & 21 Vict. c. 85, s. 21, see *Re Faraday* (2 Sw. & Tr. 369); and as to administration on the death intestate of a woman who has obtained such an order, see *Re Worman* (1 Sw. & Tr. 513); *Re Weir* (2 Sw. & Tr. 451).

Wife of convict.

The wife of a convict, banished for life, is, in some respects, entitled to the rights of a *feme sole*, and can dispose of property by will; but the property must be acquired after the conviction of the husband (*Re Martin*, 2 Rob. 405, 15 Jur. 686; *Re Coward*, 4 Sw. & Tr. 46). A conditional pardon, granted to the convicted husband by the governor of the colony to which he was transported, does not extinguish the testamentary power of the wife (*Re Martin, sup.*). But where the transportation of the husband is temporary only, his marital rights are suspended and not extinguished (15 Jur. 686, n.) See, however, *Coombs v. Her Majesty's Proctor* (2 Rob. 547), as to the extent to which the wife of a transported felon is to be regarded as a

legacy duty and expenses incident to the receipt of such legacies, TRUSTING that my said husband will, at his death, distribute my said real and personal estate among my brothers and sisters and their issue; but this expression of my confidence shall not abridge his absolute ownership, or create any equity in their favour (c). I BEQUEATH the legacies following, (namely): To

—trusting that he will leave it to testatrix's relations, but not imposing an obligation.

feme sole; in that case it was held that on the death intestate of the wife of a felon convict, her property, though acquired subsequently to her husband's conviction, belonged to the Crown, and not to her next of kin.

In *Re How* (1 Sw. & Tr. 53, 4 Jur., N. S. 366), where the husband of the testatrix had not been heard of for seven years, probate was granted as if the testatrix had died a widow.

As to a joint will of husband and wife, see *Re Stracey* (D. & Sw. 7, Joint wills. 4 W. R. 164). See also Deane, Wills, 21. Where two brothers, partners in trade, made a will which was joint throughout in its language and dispositions, probate was refused till the death of both (*Re Raine*, 1 Sw. & Tr. 144, 6 W. R. 816). But where two sisters living together executed a testamentary paper to the effect that the survivor should have all that remained of their property at the death of the first dying, and that at the death of the survivor it should be divided amongst certain relations; on the death of the survivor, administration with the will annexed was granted, as the last will and testament of such survivor (*Re Lovegrove*, 2 Sw. & Tr. 453, 8 Jur., N. S. 442).

A married woman can make a valid will of personalty, which is not settled to her separate use, provided she has the consent of her husband (*Mariot v. Kinsman*, Cro. Car. 219; *Duke of Marlborough v. Lord Godolphin*, 2 Ves. s. 75). But the husband can revoke his consent at any time during his wife's life, and it was formerly thought that he could do so at any time after her death before the will was proved (*Shep. Touch.* 403). But it has recently been held, that, when the husband has once assented after his wife's death, he cannot revoke his assent, though probate has not been granted (*Maas v. Sheffield*, 1 Rob. 364, 10 Jur. 417). In that case a married woman made a will (it is presumed of personalty) not under any power of appointment, and not purporting to dispose of her separate estate; her husband was a witness, and after her death, gave his consent in writing to the will; it was decided that he could not afterwards withdraw his consent. See Deane, Wills, 65; see also *Re Reay* (8 Jur., N. S. 596).

Will of personalty with consent of husband. Husband's power of revocation of consent.

In *Badeley v. Lyte*, a wife's will submitted (but not consented) to by the husband, who was ignorant of his power of giving or withholding consent, was pronounced against by Sir C. Cresswell (Prob. Ct., 16 December, 1859). The husband must have a full knowledge of his rights to render his consent binding.

(c) Words of request, entreaty, recommendation and desire, addressed to a devisee or legatee, respecting the destination of the property which is the

Precatory words, effect of, to create a trust.

Prec. IX.

Pecuniary
legacies.

each of my brothers and sisters £——, to be paid at the end of six calendar months after my death; To each of my nephews

Precatory
trusts.

subject of gift, possess the force of an obligation; and where they adequately define the objects of the testator's favourable regard, and the subject of recommendation or request, have the effect of converting the devisee or legatee into a trustee for those objects. To prevent this consequence, which probably is seldom intended, and, still more, to prevent the litigation which such questions too often engender, it should always be distinctly shown (as in the text) that the devisee's discretion is not to be fettered by the injunction imposed upon his conscience, or, if the contrary is intended, a trust should be unequivocally created. Perhaps it would have been well if Courts of Equity had been less keen-sighted in detecting an intention to create a trust, when wrapped in the disguise of expressions, which obviously, and in popular acceptance, do not bear such a construction. Thus, such words as "will and desire" (*Eeles v. England*, 2 Ver. 466); "request" (*Eade v. Eade*, 5 Mad. 118); "wish and request" (*Foley v. Parry*, 5 Sim. 138); "recommend" (*Tibbits v. Tibbits*, 19 Ves. 656); "entreat" (*Prevost v. Clarke*, 2 Mad. 458); "not doubting" (*Parsons v. Baker*, 18 Ves. 476); "in the fullest confidence" (*Wright v. Atkyns*, 17 Ves. 255; *Shovelton v. Shovelton*, 32 Be. 143); "authorize and empower" (*Brown v. Higgs*, 4 Ves. 708); "well know" (*Briggs v. Penny*, 3 M.N. & G. 546), and others of similar import, have been held to be imperative, and to amount to a trust. But the majority of the latest decisions indicate a disposition in the Judges of the present day not to carry the doctrine a step beyond the limits assigned to it by their predecessors (*Knott v. Cottee*, 2 Ph. 192; *Knight v. Boughton*, 11 C. & F. 513; *Webb v. Woods*, 2 Sim., N. S. 267; *Green v. Marsden*, 1 Drew. 646; *Langslow v. Langslow*, 21 Be. 552; *Huskisson v. Bridge*, 4 De G. & S. 245; *Fox v. Fox*, 27 Be. 301; *Quayle v. Davidson*, 12 Moo. P. C. 268; *Scott v. Key*, 35 Be. 291; *Eaton v. Watts*, L. R., 4 Eq. 151). The requisites that precatory words may create a trust have been said by Lord Langdale, M. R., to be "first, if the words are so used that, upon the whole, they ought to be construed as imperative; secondly, if the subject of the recommendation or wish be certain; thirdly, if the objects or persons intended to have the benefit of the recommendation or wish be also certain" (*Knight v. Knight*, 3 Be. 173); and these three requisites must co-exist: as to the existence of a fourth requisite, viz., the manner in which the trust is to be performed, see *Malim v. Keighley* (2 Ves. j. 333, 531), *Reeves v. Baker* (18 Be. 372). See, however, the remarks of Lord Truro in *Briggs v. Penny* (3 M.N. & G. 553), of Lord Cranworth in *Williams v. Williams* (1 Sim., N. S. 369), and of Vice-Chancellor Wood in *Bernard v. Minshull* (Joh. 286), as to the meaning of the maxim, that a certain subject and a certain object are necessary to constitute a trust, where the words used are precatory only. It is not necessary, to exclude a legatee from a beneficial interest, that an effectual trust shall be created: it is only necessary that it

The doctrine
not now to be
extended.

Three requi-
sites to create
a trust from
precatory
words.

who either before or after my death shall attain the age of twenty-one years, and to each of my nieces (d) who either be-

clearly appear that a trust was intended (*Briggs v. Penny, Bernard v. Minshull, ubi sup.*). See also Hawkins, Constr. Wills, 159.

See further on the subject of implied trusts, and powers in the nature of a trust, *Moriarty v. Martin* (3 Ir. Ch. Rep. 31); 1 Jarm. Wills, 354, *et seq.*; and the notes to *Harding v. Glyn*, in 2 Tud. L. C. Eq. 860.

(d) A gift to "nieces" means nieces in the first degree (*Crook v. Whitley*, 7 D. M. & G. 496); and a gift to the "present nieces of A." is identical with "the nieces of A." (*ib.*); "nephews and nieces" include children of the half brothers or half sisters of the testator (*Grievs v. Rawley*, 10 Ha. 63), but will not include grandnephews and grandnieces if there are proper nephews and nieces to answer the description (*Thompson v. Robinson*, 27 Be. 486; *Williamson v. Moore*, 10 W. R. 536). Where a widow bequeathed to her nephews and nieces simply, it was held that this did not include the nephews and nieces of her husband (*Smith v. Lidiard*, 3 K. & J. 252); but if the testatrix had had no nephew or niece, the nephews and nieces of the husband would have taken (*Hogg v. Cook*, 32 Be. 641); and where a married man bequeathed to his nephews and nieces "on both sides," the gift was held to extend to the nephews and nieces of his wife (*Frogley v. Phillips*, 3 D. F. & J. 466). "Cousins" means "first cousins" only (*Stoddart v. Nelson*, 6 D. M. & G. 68; *Stevenson v. Abington*, 31 Be. 305; *Burbey v. Burbey*, 9 Jur. N. S. 96); but first cousins once removed have been held to take under a gift to "second cousins," where there were no second cousins in existence (*Slade v. Fooks*, 9 Sim. 386; *Bennett v. Marshall*, 2 K. & J. 740). Under a bequest to "first cousins or cousins german," the children of first cousins did not take, the "cousins german" being considered as explanatory of, or merely synonymous with, the "first cousins" (*Sanderson v. Bayley*, 4 M. & C. 56). But where the gift was to testator's first and second cousins, first cousins twice removed were held entitled as being of the degree of second cousins (*Silcox v. Bell*, 1 S. & S. 301). A gift to "nephews and nieces" or "cousins" as a class is merely another way of describing the children of the testator's brothers or sisters, or uncles or aunts respectively; as to the members included in gifts to children as a class, see *post*, notes to Prec. XII.

That "family" is a flexible term, see *Blackwell v. Bull* (1 Ke. 176). It may, in a devise of freehold estates, mean the heir at law (see *Lucas v. Goldsmid*, 29 Be. 660), though that is not its natural meaning; it may mean the next-of-kin, and either living at testator's death, or at the death of some other person (see *Green v. Marsden*, 1 Drew. 651). The primary meaning of the word is "children" (*Re Terry's Will*, 19 Be. 580); and where there is an immediate absolute legacy for the benefit of "A.'s family," it should seem that the children of A., and those only, to the exclusion of A. himself, are entitled (*Barnes v. Patch*, 8 Ves. 604). But

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fore or after my death shall attain that age or be married, £——, to be paid at the end of six calendar months after they shall respectively become objects of this bequest; and To my servant [*name*], if she shall continue in my service till my death, £——, to be paid immediately after my death. And I appoint my said husband sole executor of my will (*e*). IN WITNESS, &c.

Bequests to
"family."

where a legacy is given to trustees for a married woman and her family, the married woman and her children are entitled to the benefit to the exclusion of her husband (see *McLeroth v. Bacon*, 5 Ves. 166). The context of the will must in each case determine the intended recipients under this general term, and, in the absence of anything to show the testator's intention, the word "family" will be taken to be (when applied to personalty) synonymous with "kindred" or "relations," and bequests to a person's "family" will be construed by the same rules as bequests to "relations." Generally, therefore, the next of kin according to the Statute of Distributions will be entitled: see 1 Rep. Leg. 100–119; *Re Parkinson* (1 Sim., N. S. 242); *Williams v. Williams* (Id. 358); *Lees v. Massey* (3 D. F. & J. 113); and as to a power to distribute a fund among relations, see *Finch v. Hollingsworth* (21 Be. 112); *Salisbury v. Denton* (3 K. & J. 529); *Re Caplin's Will* (2 Dr. & S. 527).

"Relations."

Appointment
by married
woman, effect
of.

(*e*) In a case lately occurring in practice, A., a married woman, having a general power of appointment over 5,000*l.*, appointed that sum by will to B. (who was named executor) and directed him to pay certain legacies which did not exhaust the whole 5,000*l.* In a contest for the unexhausted part, between the parties entitled to the whole fund in default of appointment, and B., either on his own behalf beneficially, or as trustee for the next of kin of A., an opinion was given by an eminent counsel that the mere act of appointment was in itself sufficient to dispose of the claim of those entitled in default of appointment, notwithstanding that the bequests did not exhaust the whole fund; that the beneficial claim of the executor B. was disposed of by the stat. 1 Will. 4, c. 40 (see *post*, p. 184); and that B. held the unexhausted part of the 5,000*l.* as trustee for the persons entitled under the Statutes of Distributions. See *Brickenden v. Williams* (V. C. James, 12 Feb. 1869).

Partial ap-
pointment.

But as the title of B. cannot, in the above case, extend beyond the property actually appointed by the will, if A. had appointed a portion only of the fund to B., then, notwithstanding that an executor was named, the unappointed part would go as in default of appointment. Where a married woman in exercise of a power makes a will professing to deal with nothing but the subject-matter of the power, and appoints executors "of this my will," such executors take nothing *jure representationis*, even though the woman survive her husband (and die without re-executing her will). Such a will operates only on the property disposed of in execution of the power, and as to property not disposed of under the power, the testatrix dies intestate (*Tugman v. Hopkins*, 4 M. & Gr. 389; *O'Dwyer v. Geare*, 1 Sw. & Tr. 465).

No. X.

WILL of a MARRIED WOMAN, *having no Issue, disposing of Real Estate and a Money Fund, over both of which she has Powers of Appointment, and of her separate Property, in favour of her Husband and collateral Relations.—Appointment of the Real Estate to the Husband for Life; to Trustees, for the separate Use of a Married Sister for Life; to the Sister's Husband for Life; to her Issue, as she shall appoint; to her Children in Fee, with Cross Limitations; to such Persons as she shall appoint; to the Survivor of the Sister and her Husband in Fee.—Appointment of the Money Fund to Trustees, to be disposed of as Part of the Residue.—Bequest of Specific Legacies.—Bequest of the Residue to Trustees, to pay Pecuniary Legacies and Annuities; Funds to be set apart to answer the Annuities; Ultimate Trust for Brothers and Sisters equally.—Power to give Receipts; to appoint Trustees.*

THIS IS THE LAST WILL AND TESTAMENT of me [name], the wife of [husband's name, description and addition], to take effect in the event only of my not leaving any issue living at my death. WHEREAS, under the will of my late father [name], deceased, dated the — day of —, in the year —, and proved on the — day of —, in the year —, in the Prerogative Court of the Archbishop of Canterbury, I have a general power by my will (a) to appoint the use of the fee-simple of certain freehold hereditaments situate at —, in the county of —: Now in exercise of the said power, and of every other power now or at the time of my decease hereunto enabling me, I APPOINT the

RECITAL of testatrix's power, under her father's will, of appointing real estate.

APPOINTMENT of such real estate;

(a) The recent act (1 Vict. c. 26, s. 10, *ante*, p. 24), having abrogated all peculiarities of execution and attestation in regard to appointments which are clearly expressed to be exerciseable by will, it is useless, in framing such a power, to make any requisitions of this nature, or, in framing an appointment under it, to refer to them when they exist.

Prec. X.

—to testatrix's husband for life;
 —to trustees, for the separate use of a married sister for life;

—to the sister's husband for life;
 —to the sister's children and issue, as she shall appoint;

said hereditaments to the uses following; (namely), To THE USE of my said husband and his assigns for his life, without impeachment of waste; With remainder To THE USE OF [trustees], their executors and administrators, during the life of my sister [name], the wife of [name, &c.], without impeachment of waste (b), UPON TRUST to pay the rents and profits, as the same shall accrue due, and not by way of anticipation, to my said sister, for her separate use, independently of her present or any future husband; for which rents and profits her receipts alone shall be discharges to the said trustees: With remainder To THE USE of the said [husband of testatrix's sister] and his assigns, for his life, without impeachment of waste; With remainder To SUCH USES, for the benefit of all or any one or more of the children and other issue of my said sister, by her present or any future husband [or, of my said sister by the said (husband)], such other issue being born in her lifetime, as she shall, by deed executed in the presence of and attested by one or more witness or witnesses, or by her last will, appoint; And

Waste.

Tenant for life.

Owner of defeasible fee.

(b) Where it is intended that the cestui que trust shall enjoy the proceeds to arise from the fall of timber, &c., the estate of the trustees should be made unimpeachable for waste. Tenant for life under a written instrument (*Downam's case*, 9 Rep. 10, b.), which expressly declares his estate to be without impeachment of waste, may cut timber in a husband-like manner for his own benefit, may open mines, and commit other similar acts with impunity (*Waldo v. Waldo*, 12 Sim. 107; *Lord Lovat v. Duchess of Leeds*, 2 Dr. & S. 75); but he cannot pull down or deface the family mansion, or fell ornamental timber, or commit other injuries of a like nature (*Wellesley v. Wellesley*, 6 Sim. 497; *Duke of Leeds v. Lord Amherst*, 14 Sim. 357; 2 Ph. 117). See also *Micklethwaite v. Micklethwaite*, 1 De G. & J. 504; *Morris v. Morris*, 3 De G. & J. 323; *Gent v. Harrison*, Joh. 517; *Gordon v. Woodford*, 6 Jur., N. S. 59. And an owner in fee whose estate is defeasible by an executory devise over on his dying without leaving issue living at his death, is, as to equitable waste, in the same position as a tenant for life unimpeachable for waste (*Turner v. Wright*, Joh. 740, affirmed, 2 D. F. & J. 234; see also *Blake v. Peters*, 1 D. J. & S. 345). See also, on the subject of waste in general, the notes to *Bowles' case*, in Tud. L. C. R. P. pp. 90—97; to *Garth v. Cotton*, in 1 Wh. & Tud. L. C. Eq. pp. 623—692; and the first chapter of Yool's Treatise on Waste, Nuisance and Trespass. As to working new seams of an existing mine, see *Spencer v. Scurr* (31 Be. 337); and as to abandoned or dormant mines, see *Bagot v. Bagot* (32 Be. 509). See also *Earl Cowley v. Wellesley* (35 Be. 635).

in default of appointment, To THE USE of the children, if more than one, equally, or the child, if only one, wholly, of my said sister [*or*, of my said sister by the said (*husband*)], in fee-simple, with cross limitations of the shares, original and accruing, of each of them, on his or her dying under the age of twenty-one years without leaving issue, To THE USE of the others equally, or the other wholly, in fee simple; And as to the entirety, in the event of there not being any child of my said sister, or not any such child who shall attain the said age, or die under that age and leave issue, To SUCH USES as my said sister shall by her last will appoint; And, in default of appointment, To THE USE of the survivor of them my said sister and her said husband [*name*] in fee-simple. AND WHEREAS under the settlement made in contemplation of my marriage with my said husband by indenture dated the — day of —, in the year —, I have (subject to the trusts therein contained in favour of myself and my said husband successively for life, and in favour of the children of our marriage, of which there has not been any issue) a general power of appointing, by my will, certain moneys, stocks, funds and securities thereby settled: AND WHEREAS I am possessed, as my separate property, independently of my said husband, of certain personal estate: Now, in exercise of the said power given to me by the said settlement, and of every other power now or at the time of my death hereunto enabling me, I DIRECT the said moneys, stocks, funds and securities to be paid or transferred, on the determination of the trusts prior to my said power of appointment, to the said [*trustees*], and to be disposed of by them as part of the residue, hereinafter bequeathed, of my separate personal estate. I DISPOSE of my separate personal estate in manner following; (namely), I BEQUEATH to my said husband the use, during his life, of the plate on which my family crest is engraven, he signing an inventory thereof, to be kept by my said trustees; I BEQUEATH to my said sister my said plate (subject to my said husband's right to use the same for his life); also my watch with the chain and seals, and my jewels, trinkets and other ornaments of my person; and I BEQUEATH to my servant [*name*], if she shall continue in my service till my death, all my wearing apparel: AND I DIRECT the same legacies to be delivered within one calendar month after my death. I BEQUEATH to the

—to the sister's children equally in fee, with cross executory limitations;

—to such uses as the sister shall by will appoint;

—to the survivor of the sister and her husband in fee.

RECITAL of testatrix's power, under her marriage settlement, of appointing the settled funds;

—that testatrix is possessed of separate property.

APPOINTMENT of settled funds to testatrix's executors, to be disposed of as part of her separate personal property.

Disposition of separate personal property;

—use of plate to husband for life—inventory directed;

—watch, &c. to sister;

—apparel to servant.

Delivery of legacies.
Residue of

Prec. X.

separate property to trustees:

—to pay pecuniary legacies.

said [*trustees*] the residue of my separate personal estate, UPON TRUST thereout to pay the pecuniary legacies and annuities following; (namely), A legacy of £ — to my said husband; A legacy of £ — to and for the separate use of my said sister, whose receipt shall be a sufficient discharge for the same; such legacies to be paid within three calendar months (c) after my

When legacies are to be paid.

(c) By the ordinary rule, an executor is allowed, for the payment and satisfaction of pecuniary and specific legacies, twelve months from the testator's decease; this being considered a reasonable time for enabling him to ascertain the solvency of the estate, and get in the assets (*Benson v. Maude*, 6 Mad. 15; *Brooke v. Lewis*, 6 Mad. 358. See also 10 Ves. 3). An executor, however, may, if he chooses, discharge a legacy at an earlier period, since it is due at the testator's decease, and the postponement of a year is merely made for convenience, which may in some cases require less; for if the solvency of the estate is beyond all question, and the property is immediately available, there is no reason for deferring payment; and the adherence, under such circumstances, to the rule which allows a year, seems to be an abuse of it. Of course, a direction (as in the text) to pay or deliver legacies at an earlier period, operates only as between claimants under the will, and ought not, any more than the general rule which allows a year, to be acted upon by an executor until the ascertained circumstances of the estate justify the measure, in other words, until he is satisfied of its sufficiency to answer debts and legacies; if, indeed, looking at the possible existence of latent demands, the sufficiency of the estate can ever be said to be completely ascertained.

Direction to pay at an earlier period.

Suggestion as to taking security from legatees to refund.

This last consideration suggests the propriety of generally taking from a legatee security to refund, in case any new demands should be made upon the executor to which the general personal estate is inadequate; a precaution which is doubly important where an executor is about to relinquish his hold on the residuary property. In such a case, an indemnity against latent claims should be required from the residuary legatees; for it would in general be no answer to the claimants to aver that the executor had parted with the assets to legatees in ignorance of the existence of their demands; as it is the duty of an executor to find out the creditors of his testator, and he commits a *devastavit* by paying a legatee before a creditor (*Hawkins v. Day*, Amb. 160, 803). There is no doubt, however, that a creditor may lose his claim on the assets by unreasonable delay. This was admitted in the case of *Davis v. Blackwell* (2 Moo. & S. 7); though, there, an executor's distribution of the residue within six months after probate was considered to have been too hasty. See also *Nosotti v. Jefferson* (11 W. R. 841; 2 N. R. 411), where the Lord Justice Turner is reported to have said that it would require something like fraud to vitiate the payment by an executor of a simple contract debt, without notice of a specialty debt. In *Norman v. Baldry* (6 Sim. 621), payment of a bond was en-

decease; A legacy of £ ——— to every son who shall attain the age of twenty-one years, and every daughter who shall attain that age

forced against executors who had distributed the estate among the legatees in ignorance of the existence of the bond debt, which was not claimed until nine years after the testator's decease, the same having then only recently become due; see also *Brown v. Lake* (1 De G. & S. 144); *Atkinson v. Grey* (1 S. & G. 577). In *Davis v. Blackwell* (*ubi sup.*), the action was to recover damages for breach of covenant in a lease granted to the testator—a species of obligation which is peculiarly likely to give rise to after-claims upon the testator's estate; the only question is whether an executor, who is about to part with leaseholds to a specific or residuary legatee, ought to be satisfied with the bond or covenant of the legatee, or to require further security—a point which was discussed, but not decided, in the case of *Bolland v. Simmons* (3 Mer. 547). In some cases the Court has ordered a sum of money to be set apart (*Dobson v. Carpenter*, 12 Be. 371; *Fletcher v. Stevenson*, 3 Ha. 360; *Brewer v. Pocock*, 23 Be. 310); but in *Dean v. Allen* (20 Be. 1), the personal covenant of the residuary legatees, and in *Waller v. Barrett* (24 Be. 413), the recognizance of the parties beneficially entitled to the estate, by way of indemnity, were severally held to be sufficient; and see *post*, p. 154.

Executor's liability to the performance of covenants in leases.

Even where a testator has disposed of a lease in his lifetime, his estate may become answerable for breaches of covenant, in case the purchaser should fail to indemnify the testator against the covenants; an executor, therefore, should not overlook the possibility of claims from that quarter.

But an executor omitting to take from legatees security to refund in the event of debts being recovered, is not without remedy; for, though it is clear that an executor, who voluntarily pays a legacy in the mistaken supposition that the assets are sufficient, cannot afterwards call upon the legatee to refund (*Orr v. Karnes*, 2 Ves. s. 194; *Keylinge's case*, 1 Eq. Ca. Ab. 239, pl. 35), yet this doctrine does not apply where the deficiency is occasioned by the subsequent claims of unsatisfied creditors; for it seems to be the better opinion, that an executor who is called upon to pay debts, after having distributed the testator's estate, without notice of those debts, may claim reimbursement from the legatees (2 Wms. Exors. 1344, 1 Rep. Leg. 458). A creditor clearly may compel pecuniary legatees (*Newman v. Barton*, 2 Ver. 205; *Nelthrop v. Biscoe*, 1 Ch. Cas. 136; *Davis v. Davis*, 8 Vin. Ab. 423, pl. 35; *March v. Russell*, 3 M. & C. 31), and also specific legatees, although the executor has assented to and transferred to them their legacies (*Davies v. Nicolson*, 2 De G. & J. 693), to refund, even where the estate has been distributed under the decree of a Court of Equity (*Gillespie v. Alexander*, 3 Rus. 130; see also *Greig v. Somerville*, 1 R. & M. 338; *David v. Frowd*, 1 M. & K. 200; *Jennings v. Paterson*, 15 Be. 28); and it would seem, that an executor paying the creditor would be entitled to stand in his place: but, even in favour of a creditor, *bonâ fide* purchasers for value of legacies which have been paid or delivered would

Legatee's liability to refund.

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—and life annuities.

or be married, of my said sister, to be paid immediately after the same shall become vested; An annuity of £ ——— to my servant [*name*], if she shall continue in my service till my death, to be payable during her life (*d*), and to be enjoyed as her separate

not be compelled to refund (*Noble v. Brett*, 24 Be. 499; *Dilkes v. Broadmead*, 2 Gif. 113; 2 D. F. & J. 566).

Mistaken construction of will.

If an executor voluntarily pays a legacy under an erroneous construction of the will, he may, it seems, compel the legatee to refund the legacy, but without interest; though interest was given where it happened that the legatee was entitled to another fund in the hands of the Court of Chancery making interest (*Gittins v. Steele*, 1 Sw. 199). As to the liability of the executor in such a case, see *Saltmarsh v. Barrett* (31 Be. 349).

Executors and administrators, how relieved from responsibility.

Executors or administrators may relieve themselves from liability by administering their testator's or intestate's estate under the direction of the Court of Chancery (*Low v. Carter*, 1 Be. 426). The direction of the Court is a full indemnity to the executors or administrators (they bringing all the facts before the Court), and there is never any necessity for retaining assets in order to protect them (*Bennett v. Lytton*, 2 J. & H. 155; *Williams v. Headland*, 4 Gif. 505; *Reilly v. Reilly*, 34 Be. 406). Where the executor has notice of an existing liability, the Court will not take the assets out of his hands without seeing him indemnified against it (*Hughes v. Young*, 4 N. R. 17). Executors or administrators may also, without a suit, by acting pursuant to the provisions of 22 & 23 Vict. c. 35, s. 29, and 23 & 24 Vict. c. 38, s. 14, obtain the same protection as if the estate had been administered by the Court (*Clegg v. Rowland*, L. R., 3 Eq. 368); whilst as regards future liabilities in respect of rents, covenants or agreements contained in leases granted or assigned to the testator or intestate, a statutory protection is also afforded by 22 & 23 Vict. c. 35, s. 27, which section is retrospective in its operation (*Re Green's Trusts*, 2 D. F. & J. 121; see also *Smith v. Smith*, 1 Dr. & S. 386; *Dodson v. Sammel*, 1 Dr. & S. 575; *Bennett v. Lytton*, *ubi sup.*; *Bunting v. Marriott*, 9 W. R. 264).

22 & 23 Vict. c. 35, ss. 27, 29.

The course of practice under the two last-named Acts is given in J. Sidney Smith's *Chan. Pr.* 1104, *et seq.* See also Hunter's edition of the Act 22 & 23 Vict., pp. 84—91; *Consol. Orders*, xxxv., 35—37.

As to relief from contingent liabilities, see 13 & 14 Vict. c. 35, ss. 23, 24, 25; and 10 Ha. App. xxxiii., liv.

Annuity for life, or perpetual.

(*d*) The general rule is that where an annuity is given to a person by a will creating the annuity, the annuitant takes for life only (*Yates v. Maddan*, 3 M. & G. 532, and the authorities there discussed). A bequest of an annuity simply, implies no more than a gift for life, unless there is something else in the will to enlarge the bequest (*Potter v. Baker*, 13 Be. 273; *Blewitt v. Roberts*, Cr. & Ph. 274; *Nichols v. Hawkes*, 10 Ha. 342; *Lett v. Randall*, 2 D. F. & J. 388); but the question is entirely one of

property, free from the control of any husband to whom she may be married; Also an annuity of £—— to [*name, &c.*] and [*chris-*

intention, to be deduced from the words of the whole will (*Banks v. Annalties. Braithwaite*, 11 W. R. 298). An annuity is perpetual where the testator indicates an intention to that effect by segregating and appropriating a portion of his property, from the profits of which the annuity is to be paid; or where the annuity is given out of, or the gift is coupled with or has reference to, a particular fund, the pointing to the fund being such an indication of intention as amounts to a dedication of so much of the fund as will absolutely purchase the annuity (*Stokes v. Heron*, 12 C. & F. 161). And an annuity to A. directed "to be purchased in the British funds," accompanied with a direction to sell certain lands, "the produce to go to the carrying out of the aforesaid annuity," was held to be a perpetual annuity (*Kerr v. Middlesex Hospital*, 2 D. M. & G. 576; see, however, *Re Grove's Trusts*, 1 Gif. 74). A direction to buy an annuity in the public funds means to purchase such an amount in the funds as will suffice to produce the annuity; and where a fund is to be purchased for A., that fund so purchased belongs to A. (*Ross v. Borer*, 2 J. & H. 469). And if a certain amount *per annum* is given, and on the construction of the whole will this is held to be a gift in perpetuity, but the testator has not specified out of what particular property or fund the annual sum is to be provided, the annuitant is entitled to the best security to be obtained (*Hill v. Rattey*, 2 J. & H. 634); but see *Vickery v. Evans* (33 Be. 376). See also *Hedges v. Harpur* (3 De G. & J. 129); *Mansergh v. Campbell* (3 De G. & J. 232); *Hawkins*, Constr. Wills, 125.

An annuity bequeathed out of personalty is not within sect. 42 of the Statute of Limitations (3 & 4 Will. 4, c. 27); and where the residuary personalty remained unapplied, payment of arrears of such an annuity has been ordered, as against residuary legatees, after thirty-seven years of insufficient payments (*Re Ashwell's Will*, Joh. 112); nor does that section apply to arrears of an annuity charged upon a reversionary interest in land, so long as the interest continues reversionary (*Wheeler v. Howell*, 3 K. & J. 201), or to a case where real estate is vested in trustees upon trust to pay an annuity (*Lewis v. Duncombe*, 29 Be. 175); nor does sect. 40 apply to a case where the executor in his residuary account stated that he had retained a legacy in trust (sect. 25) for the legatee (*Tyson v. Jackson*, 30 Be. 384); but a devise "subject to legacies" does not create a trust (sect. 25) for payment so as to take the case out of sect. 40 (*Jacquet v. Jacquet*, 27 Be. 332; *Dickinson v. Teasdale*, 1 D. J. & S. 52; *Proud v. Proud*, 32 Be. 234).

As a general rule, an annuitant under a will is not allowed interest on the arrears of his annuity (*Booth v. Coulton*, 2 Gif. 514).

Another point which has frequently occurred in gifts of annuities is, whether, in the event of the annual income of the estate or fund out of

Arrears, Sta-
tute of Limi-
tations, sects
25, 40, 42.

Income of
fund inad-
equate.

Prec. X.

— *tian name*] his wife, and the survivor of them, for their lives and the life of such survivor: which several annuities shall com-

which the annuity is payable proving inadequate for the purpose, the *corpus* or capital is applicable to supply the deficiency.

Cases in which corpus is not applicable to make good the deficiency.

The question is entirely one of intention, to be gathered from the words of the particular will. If the annuity is made payable out of the rents and profits of real estate devised to trustees, who are directed on the death of the annuitant to convey the estate to others (*Foster v. Smith*, 1 Ph. 629), or out of the interest, dividends and produce of a fund, followed by a trust to transfer the *corpus* on the death of the annuitant, expressed in words indicating an intention to leave the *corpus* undiminished (*Earle v. Bellingham*, 24 Be. 445), or if the testator in any way manifests an intention that the fund shall be preserved in its integrity during the life of the annuitant, and in that state go over (*Baker v. Baker*, 6 H. L. C. 616; 6 W. R. 410; and see 2 D. M. & G. 655), then the *corpus* is not applicable to make good the deficiency. See also *Miller v. Huddleston* (3 M. & G. 513); *Hindle v. Taylor* (20 Be. 109), *Addcott v. Addcott* (29 Be. 460); *Sheppard v. Sheppard* (32 Be. 194). But where real estate is devised subject to and chargeable with the payment of an annuity (*Picard v. Mitchell*, 14 Be. 103; *Byam v. Sutton*, 19 Be. 556; but see *Philipps v. Philipps*, 8 Be. 193), or "from and after payment" of an annuity "and subject thereto" (*Birch v. Sherratt*, L. R., 2 Ch. App. 644), or if the testator directs the setting apart or the investment of so much money as will produce a certain annual sum (*May v. Bennett*, 1 Rus. 370; *Wright v. Callender*, 2 D. M. & G. 652; *Mills v. Drewitt*, 20 Be. 632; *Miner v. Baldwin*, 1 S. & G. 522; *Bright v. Larcher*, 3 De G. & J. 148), or if the testator directs that not only the interest of a fund, but the fund itself, is to be held in trust to pay an annuity (*Hickman v. Upsall*, 2 Gif. 124), or if there be a gift of rents and profits or income, without restriction as to time, for the purpose of meeting the annuity, followed by a gift over of the residue (*Phillips v. Gutteridge*, 1 N. R. 3, 11 W. R. 12; but compare *Stelfox v. Sugden*, Joh. 234), then the *corpus* is applicable to make good the deficiency. See also *Perkins v. Cooke*, 2 J. & H. 393; *Upton v. Vanner*, 1 Dr. & S. 594; *Tarbottom v. Earle*, 11 W. R. 680; *Howarth v. Rothwell*, 30 Be. 516, in a note to which, at p. 519, numerous cases on this subject are collected.

Cases in which corpus is applicable.

Marshalling.

And, as to marshalling funds or estates for the payment of annuities, see *Fielding v. Preston* (1 De G. & J. 438); *Yates v. Yates* (28 Be. 637).

Where an annuity was left to A., to be paid by the testator's executor and residuary legatee B., who was empowered to require A. to attend personally at a particular place to give receipts; it was doubted whether such a condition was good; but whether good or not, it was held that the annuity was assignable (*Arden v. Goodacre*, 11 C. B. 883).

Registration.

Annuities given by will are not required to be registered. See 18 & 19 Vict. c. 15, s. 14.

mence from my death, and be paid quarterly, without deduction (e): AND I DIRECT my said trustees to set apart, within Direction to

Annuities should, in general, be given free from legacy duty (11 Jarm. Byth. 468).

A gift by will of an annuity "clear of all taxes and deductions," or of a rent-charge "clear of legacy duty and every other deduction whatsoever," will not exempt the person entitled to the annuity or charge from payment of the property or income-tax. See 5 & 6 Vict. c. 35, ss. 73, 102; 16 & 17 Vict. c. 34. The thing that is given is the thing that is to pay the tax (*Wall v. Wall*, 15 Sim. 513); and income-tax is not properly a deduction out of the estate or legacy, but a charge which the legislature has fixed on the person himself who receives the benefit (*Lethbridge v. Thurlow*, 15 Be. 335). See also *Sadler v. Rickards* (4 K. & J. 302); *Abadam v. Abadam* (33 Be. 475). But a testator may so explain the word "deduction" as to show that he intends it to include income-tax, and then effect will be given to his intention (*Turner v. Mullineux*, 1 J. & H. 335). Where a testator devised a mansion and lands to his wife for life, and directed his trustees, out of the rents of other real estates, during the wife's life to insure and repair and pay all taxes, parliamentary, parochial or otherwise, affecting the hereditaments given to his wife, it was held that income-tax came within the words "affecting the hereditaments," that the direction did not contravene the terms of the income-tax Acts, and that the trustees were bound to pay the income or property-tax payable in respect of the widow's interest (*Lord Lovat v. Duchess of Leeds*, 2 Dr. & S. 62). And where lands were devised to trustees to the use that M. should receive during her life one yearly rent-charge of 2,200*l.*, to be charged upon and issuing out of the lands mentioned, to be paid half-yearly "without any deduction or abatement whatsoever, on account of any taxes, charges or assessments already or to be thereafter taxed, charged, assessed or imposed on the same hereditaments, or on the said rent-charge of 2,200*l.*, or on the said M. or her assignees in respect thereof, by authority of parliament, or otherwise howsoever," it was held, that M. was entitled to receive the rent-charge in full, without any deduction in respect of income-tax (*Festing v. Taylor*, 3 B. & S. 235). These, however, were cases of mere bounty; but a contract for the payment of an annuity or rent-charge in full, without deducting the tax, is void, so far as the latter proviso is concerned; and, consequently, notwithstanding that there be an express trust for payment of the annuity or rent-charge in full, the income-tax must be borne by the annuitant or donee of the charge (*Floyer v. Bankes*, 11 W. R. 630; 2 N. R. 7).

Gift of an annuity "free from taxes:" annuitant pays the income-tax.

(e) Where the time of first payment is fixed by the will, the payment must, of course, be made as directed, if the executor be satisfied of the sufficiency of the estate to answer debts and legacies; but if no time of payment is fixed, an annuity commences from the day of the testator's death, and the first payment is to be made at the end of twelve months

Time of commencement and first payment of annuity.

Prec. X.

—
set apart
funds for an-
swering an-
nuities.

A proportion
of the an-
nuities to be
paid down to
the death.

twelve calendar months after my decease, in their names, in the Consolidated and Reduced Three per Cent. Stocks (*f*), or in one of those stocks (and not in any other investment) funds sufficient at the period of appropriation for answering the said annuities, and in the meantime to pay the same annuities out of the said residue; AND I DECLARE, that sums proportionate to such parts of the current quarter as shall have elapsed at the deaths of the respective annuitants, shall be paid to their respective executors or administrators (*g*), at the end of one

from that day (2 Wms. Exors. 1288; *Houghton v. Franklin*, 1 S. & S. 392; and see *Trimmer v. Danby*, *post*, p. 160). But it seems doubtful whether this rule would hold in a case where the annuity is given out of a residue (*Storer v. Prestage*, 3 Mad. 168). And as to the distinction in this respect between an annuity and a legacy for life, see *Gibson v. Bott* (7 Ves. 96).

Time of first
payment of
annuity.

To say that the first quarterly or half-yearly payment of an annuity shall be made at a given period, does not necessarily imply that the annuity is to commence from the commencement of the quarter or half-year terminating at such day of payment. For instance, where a testator gave an annuity to A. for life, and directed the first payment to be made within one month from his (the testator's) death, the annuity was held to commence from the death of the testator; and though the first year's payment was to be made at the appointed time, the second annual payment did not become due until the end of the second year (*Irvin v. Ironmonger*, 2 R. & M. 531). It will be observed, that, in this case, to have held the annuity to be payable continuously from the first payment, would have had the effect of giving it a commencement in the lifetime of the testator. See also *Williams v. Wilson* (5 N. R. 267), as to apportionment of the first payment of an annuity directed to be paid on the usual quarter days.

Appropriation
of stock to
answer
annuity.

(*f*) Where an annuity is payable quarterly, it is convenient that the fund appropriated for the payment of it should be composed of Three per Cent. Consols, and Three per Cent. Reduced, in equal proportions, and then the half-yearly dividends on the two investments alternately yield the quarterly sums required for the annuity.

Apportion-
ment of
annuities.

(*g*) Prior to 4 & 5 Will. 4, c. 22, annuities were not apportionable (*Wilson v. Harman*, 2 Ves. s. 672, Amb. 279; *Pearly v. Smith*, 3 Atk. 260; *Sherrard v. Sherrard*, 3 Atk. 502; *Rashleigh v. Master*, 3 Br. C. 101; *Webb v. Lord Shaftesbury*, 11 Ves. 361), except when they were payable for the maintenance of infants (*Hay v. Palmer*, 2 P. W. 501; *Reynish v. Martin*, 3 Atk. 330; *Sheppard v. Wilson*, 4 Ha. 395), or of married women living apart from their husbands (*Howell v. Hanforth*, 2 W. Bl. 1016; and see *Anderson v. Dwyer*, 2 Sch. & Lef. 303). If an annuitant died before, or even on, the day of payment, his representative could not

Prec. X.

calendar month after their respective deaths. AND as to the said RESIDUE, subject to the trust and direction aforesaid (but

Ultimate trust for brothers and sisters equally—

claim any sum for the elapsed portion of the current year, half-year or quarter (as the case might be), the annuity not being due until the end of such day, *i. e.* at midnight. On the subject of apportionment previously to the recent Act, see the very full and able note to *Ex parte Smyth*, (1 Sw. 337—357). See also *Warden v. Ashburner*, 2 De G. & S. 366.

The law upon this subject, however, is now regulated by the above statute (4 & 5 Will. 4, c. 22), which came into operation on 16 June, 1834. The object of this Act is twofold: first, to extend the remedies of 11 Geo. 2, c. 19, to the representatives of lessors not strictly tenants for life, and to lessors whose interests determined by the death of *cestuis que vie*; secondly, to apportion rents, annuities and other payments not apportionable unless express provision be made for the purpose. The intention of the Legislature, as gathered from the preamble to the Act, was to apply generally to periodical payments the principle of apportionment in respect of time: but owing to the unhappy phraseology employed in the sections of the Act, this intention has only partially been carried out. The person entitled to the rent, annuity or other payment is able to recover the proportionate part only (sect. 2) “when the entire portion of which such apportioned parts shall form part *shall* become due and payable, and not before;” the part is not due until the whole is due, and if the entire portion never becomes payable the Act does not apply; and thus the ordinary case of an annuitant for life (one of the principal cases which the statute was intended to remedy) is excluded from the benefit of the Act (*Reg. v. Lords of Treasury, in re Queen Dowager's Annuity*, 16 Q. B. 357), which applies only where the rent, annuity or other payment still remains, and is a continuing and subsisting payment, after the determination of the interest of the person between whom and the next recipient the apportionment has to be made. The words above quoted contemplate “a case where the party who has to pay will have to pay for the whole period to some one, and not a case where the payment entirely ceases with the determination of the interest of the person receiving the apportionment, and where the entire portion of which this forms a part never does become due or payable” (*Lowndes v. Lord Stamford*, 18 Q. B. 439). But in *Carter v. Taggart*, (16 Sim. 447), where a testator directed a fund to be formed by investing the rents of his estates in bank annuities, and charged the fund with the payment of 150*l.* a year to his wife for her life, it was held that the testator's widow was to have so much of the dividends of the accumulating fund as would be equal to 150*l.* a year. “The Act directs dividends to be apportioned between the tenant for life of the fund from which they accrue, and the remainderman. And the fact that the fund is an accumulating one, and therefore the dividends of it are perpetually varying in amount, does not vary the case. The Act creates an apportionment, but the time for making it does not arrive until another dividend becomes due” (16 Sim.

4 & 5 Will. 4, c. 22, respecting the apportionment of rents, annuities, &c.

As to whether the payment must be a continuing payment.

inclusive of the funds to be set apart pursuant to such direction, when and as the respective annuities payable thereout shall

Apportion-
ment Act.

449). And in *Trimmer v. Danby* (23 L. J., Ch. 979; 2 W. R. 380), where a testator (the painter, J. M. W. Turner) gave an annuity to the defendant for her life, without any direction as to the period of payment, and it was ordered by the Court that the first payment should be made at the end of one year from testator's death, but the annuitant died eight days before the end of the year, Sir *R. T. Kindersley*, V.-C., held that the annuity must be apportioned; the Vice-Chancellor, in his judgment, considered at length the scope and meaning of the Apportionment Act, and came to the conclusion, that to exclude from its application the case where the interest was only in the first annuitant, and to confine it to the case where the annuity was to be continued indefinitely, would be to entirely prevent the benefit intended to arise from the Act. Without impugning any of the previous cases, His Honour, "could not agree in the observation that the annual payments must be so given as in terms directed specifically to continue after the death of the annuitant" (2 W. R. 381).

Rents re-
served on
leases.

The Act extends to these two classes of cases: first, under the earlier words, whenever a lease was made after the Act, whether by tenant in fee or for life, or under a power, there would be an apportionment, even though the life interest in respect of which the apportionment was to take place should have been created by an instrument executed before the Act. Secondly, under the remaining words, there would also be an apportionment of all rents, whether created before or after the passing of the Act, in which a life interest was created by an instrument subsequent to the statute. In short, the statute reaches all cases where either the lease reserving the rent, or the instrument creating the life interest, is subsequent in date to the Act (*Plummer v. Whiteley*, Joh. 585); in which case a power of leasing contained in a settlement dated before the Act was exercised after the Act, and the rents were held to be apportionable. See also *Wardroper v. Cutfield* (3 N. R. 410); *Llewellyn v. Rous* (L. R., 2 Eq. 27).

It seems then that the leaning of the Equity Courts in the present day is to put a broad and liberal construction upon the Apportionment Act. But in the unsettled state of the decisions on the subject, it is proper to insert a clause expressly directing apportionment, where it is intended that it shall take place, or expressly negating it in other cases. Where the annuity is computed from the testator's death, it seems fair that it should continue payable down to the death of the annuitant; but not so, where the first payment is directed to be made on one of certain quarterly or half-yearly days occurring next after the testator's decease, as this real gain of an early payment may well be taken to counterbalance the possible loss to the legatee at the end of his time of enjoyment. See however *Williams v. Wilson* (5 N. R. 267), as to apportionment of the first payment.

drop), UPON TRUST to pay or transfer the same to and equally among my brothers and sisters [*names*]; the respective shares sister's shares

The interest of money advanced is considered as accruing due *de die in diem*, and is therefore apportionable, independently of the statute (*Re Rogers's Trusts*, 1 Dr. & S. 338; but see *Re Brettle*, 2 D. J. & S. 79, as to interest payable to a married woman for her separate use without power of anticipation): this is true even though the money be invested on mortgage on real security; and it is suggested (8 Jur., N. S., pt. 2, p. 536) that the way out of the existing difficulties as to apportionment is to enact that rents shall in that respect be considered as accruing due from day to day. Interest.

But, under the general law, a legatee for life, of the income of property invested at the time of his decease in the public securities, dying before one of the half-yearly days of payment, would not be entitled, without an express direction in the will, to any part of the half-yearly dividend becoming due on that day; supposing, of course, the case not to be within the above Act, which, in cases to which it is applicable, enables the executor to receive an apportioned part. But dividends on stock falling due on the day of the death of a person, owner for life of the stock, belong to his estate (*Paton v. Sheppard*, 10 Sim. 186). Public securities.

Where a testator's estate is directed to be converted, the price received for securities sold varies according to the distance from the last payment of dividend; but there is no equity to an apportionment between tenant for life and remainderman of the purchase-money arising from the sale of securities realized between dividend days (*Scholefield v. Redfern*, 2 Dr. & S. 173; and see *Freman v. Whitbread*, L. R., 1 Eq. 266).

In order to exclude apportionment in cases within the statute, an express direction that there shall be none is required; or at least that the terms of the gift shall be so specific that apportionment is clearly inconsistent therewith. Inference from the general tenour and context of the will is not sufficient to exclude the operation of the statute (*Tyrrell v. Clark*, 2 Drew. 86). Exclusion of apportionment, express direction necessary.

It has been held that this Act does not extend to parol demises (*Re Markby*, 4 M. & C. 484; see also *Cattley v. Arnold*, 1 J. & H. 651). But, independently of the statute, where entailed lands had been let by parol to tenants from year to year, it was held, that, on the decease of the tenant in tail, his personal representative was entitled to an apportioned part of the rent to the period of his decease, under the Act of 11 Geo. 2, c. 19 (*Kevill v. Davies*, 15 Sim. 466). And see *Mills v. Trumper* (L. R., 1 Eq. 671, reversed by the Lords Justices, 11 Feb. 1869). As to a letting from year to year, see 4 Jarm. Byth. 342; and as to apportionment in respect of dower, see *Harrop v. Wilson* (34 Be. 166). Parol demises. Dower.

The statute applies to cases in which the interest of the person is terminated by his own death or by the death of another: but does not apply as between the real and personal representatives of a deceased owner, whose interest is not terminated at his death (*Browne v. Amyot*, 3 Ha. 173). The

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for their separate use.

of my sisters to be enjoyed and disposed of by them respectively as separate property, free from marital control, and their re-

Apportionment Act.

death of the person interested in the rent or other payment, the event on which the apportionment is to take place, must be a death occasioning the determination of the interest (*ib.* 183). See also *Oldershaw v. Holt*, 12 A. & E. 590; *Beer v. Beer*, 12 C. B. 60, 16 Jur. 223; and *Re Clulow's Estate*, 3 K. & J. 689. Thus, if a person dies on the 1st of February, seised of lands of inheritance held by lease, under which the rent becomes due at Midsummer and Christmas, the heir, or devisee, of the land, would be entitled to the entire rent of the current half-year, without any right in the executor or administrator to claim the portion of such half-year which elapsed in the lifetime of the deceased owner, namely, from the 25th of December to the 1st of February. See also Wms. Exors. 782.

The act applies to the case of the expiration of a term of years in trustees to accumulate rents for payment of debts, legacies and charges, with remainder to a tenant for life (*St. Aubyn v. St. Aubyn*, 1 Dr. & S. 611; *Wheeler v. Tootel*, L. R., 3 Eq. 571); but it applies only to rents reserved at fixed periods, and not to royalties upon the selling of ore gotten from a mine, payable at uncertain periods (*St. Aubyn v. St. Aubyn*, *ubi sup.*; but see *Llewellyn v. Rous*, L. R., 2 Eq. 27).

Where lands were let from Lady Day at a yearly rent, payable on the four usual quarterly days, and the tenant for life died on the 1st July, 1857 (on the seventh day of the second quarter, which contained ninety-seven days), it was held that the tenant for life was entitled to the whole of the quarter's rent from the 25th March to the 24th June, and to $\frac{7}{365}$ of the annual rent, in respect of the seven days from the 24th June to the 1st July. The question was, whether in respect of the seven days the year's rent or the quarter's rent should be apportioned; in other words, whether the tenant for life was entitled to $\frac{7}{365}$ or $\frac{7}{97}$ of $\frac{1}{4}$ ($=\frac{7}{368}$). The V.-C. *Kindersley* considered that it was the yearly rent that was apportionable (*Wellesley v. Mornington*, V. C. K. in Chambers, 1859).

Additional cases.

See also *Hartley v. Allan* (6 W. R. 407), *Re Maxwell's Trusts* (1 H. & M. 610), as to dividends on shares in companies payable at fixed periods, which were held to be within 4 & 5 Will. 4, c. 22; *Lord Londesborough v. Somerville* (19 Be. 295); *Bulkeley v. Stephens* (3 N. R. 105). But the following were not within that statute: *Lowndes v. Lord Stamford* (18 Q. 425, salary of manager holding office during joint lives of himself and employer); *Peers v. Sneyd* (17 Be. 156, rents); *Re Lawton Estates* (L. R., 3 Eq. 469, dividends on funds paid into Court under the Lands Clauses Act).

24 & 25 Vict. c. 134, s. 160.

As to proof for the proportionate part of payments, falling due at fixed periods, for which an adjudicated bankrupt is liable, see sect. 150 of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134).

On the subject of apportionment, reference may also be made to the cases cited in 12 Be. 317, n.; and to the following authorities; 1 Hayes, Conv. 333; Burton, Compend. 342 (n.); Sidney Smith's Ch. Pr. 1142; 2

spective receipts to be sufficient discharges to my said trustees for the same. AND I DECLARE that the receipts of my said trustees for such moneys, stocks, funds and securities as shall be paid or transferred to them by virtue of my will shall effectually discharge the persons paying or transferring the same from liability to see to the application thereof (*h*). AND I DECLARE that my said trustees shall be answerable for their own respective acts, receipts and defaults only, and shall be at liberty to retain and to allow to each other, out of moneys coming to their hands by virtue of my will, all expenses incurred in executing the trusts thereof (*i*). I DECLARE that in case of the death in my lifetime of my said trustees or any of them, or after my decease, on the death, refusal, unfitness, incapacity, or retiring from the trusteeship of the said trustees, or any of them, or of any trustees or trustee to be appointed under this clause, or by a Court of competent jurisdiction or otherwise according to law, it shall be lawful for my said brothers and sisters and the survivors and survivor of them (and as to my said sisters notwithstanding (*k*) coverture), and after the death of such survivor for the capable trustees or trustee, if any, for the time being of my will, whether refusing further to act or not, and, if none, for the executors or administrators, or any or either of them (*l*) [*or*, for the acting executors or executor for the time being (*m*), or the administrators

Power enabling trustees to give receipts.

Indemnity of trustees.

Power to brothers and sisters, and survivors, &c. to appoint new trustees.

Jarm. Byth. 365—368, n. (*h*); 4 Jarm. Byth. 338—345; and the notes to *Clun's Case*, in Tud. L. C. R. P. 248—259.

(*h*) See note (*b*), *ante*, p. 115.

(*i*) This indemnity clause may now be safely omitted. See note (*b*), *ante*, p. 112.

(*k*) See Sugd. Pow. 155, 167.

(*l*) These words, "or any or either of them," are introduced to obviate the question, whether, as this is a bare authority given to persons answering a certain description, all those persons must not concur in the exercise of it; see Sugd. Pow. 126—128; and as non-proving or non-acting executors, &c., are seldom willing to concur, the want of these or equivalent expressions has often created great difficulties; but it may well be contended, that a party named an executor, who neither proves nor acts, is not an executor. And see now 20 & 21 Vict. c. 77, s. 79; 21 & 22 Vict. c. 95, s. 16.

Power to appoint new trustees.

(*m*) In this power the word "proving" and the word "acting" are both open to objection: the latter word, which is used in Lord *Cranworth's*

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Substituted clause in case 23 & 24 Vict. c. 145, is relied on.

Clauses relative to the trustees named, extended to trustees for the time being.

Appointment of executors.

or administrator for the time being], of the last deceased trustee, from time to time by deed to appoint a fit person or fit persons to supply the place of the deceased, refusing, unfit, incapacitated or retiring trustee or trustees. [Or, I DECLARE that a new trustee or new trustees of this my will may, from time to time, be appointed by deed by my said brothers and sisters [*names*], or the survivors or survivor of them (and as to my said sisters notwithstanding coverture), and subject as aforesaid in the manner prescribed by law (*n*).] I DECLARE that the number of my trustees may from time to time be increased or diminished, but so that the number do not exceed — or be less than —, and that the previous clauses, so far as they concern my trustees hereinbefore named, shall extend and apply to the trustees and trustee for the time being of my will (*o*). I APPOINT my said brothers [*names*] to be executors of my will. AND I REVOKE all other wills. IN WITNESS, &c.

Act (23 & 24 Vict. c. 145, s. 27), and in Dav. Conv. (see vol. 3, pp. 168, 563), is to be preferred: but it is manifest that where all the executors do not prove, it may not be easy to determine who are the “acting” executors. The words “for the time being,” though not used in Lord *Cranworth’s* Act, seem to be necessary (Sugd. Pow. 126—128).

(*n*) See note (*a*), *ante*, p. 129.

As to the expression “trustees or trustee for the time being,” &c.

(*o*) Where this plan is adopted, the expression throughout the previous parts of the will should be simply “my said trustees;” where it is not adopted, the expression should be “the trustees or trustee for the time being of my will.”

Or, the words “my trustees or trustee” may be used throughout, and at or near the end of the will, the following clause introduced:

“I declare that the expression ‘my trustees or trustee’ shall be construed and taken to mean the trustees or trustee for the time being of my will, whether original or substituted.

Much confusion and uncertainty not unfrequently arise from want of accuracy or uniformity in this particular. Sometimes in the same will, and with reference to the same subject, we find—“the said A. B. and C. D., and the survivor of them, his heirs, executors, administrators and assigns,” —“the said A. B. and C. D., and the survivor of them, his executors and administrators,”—“the said A. B. and C. D., their heirs, executors,” &c.—“the said A. B. and C. D. and the survivor of them, their heirs, executors and administrators, and the trustees or trustee to be appointed,” &c.

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WILL devising Real Estate to Trustees, upon Trusts for raising Money, by Mortgage, in aid of the Personal Estate, to pay Debts and Legacies; and, subject thereto, for the Testator's Son and his Issue, in strict Settlement; and, failing such Issue, for raising certain Sums; and, subject thereto, for collateral Relations.—Power of Leasing.—Specific Bequest of Leaseholds for Years, and other Specific Legacies.—Bequest of Annuities and Pecuniary Legacies—Devise of Mortgage and Trust Estates.—Power to give Discharges to Mortgagees and others.—Power to appoint new Trustees.

THIS IS THE LAST WILL AND TESTAMENT of me, [*testator's name, residence and quality*]. I DEVISE all the freehold and copyhold manors, messuages, lands, tenements and hereditaments, to which I may be entitled at my decease, with their actual and reputed appurtenances, unto and to the use of [*trustees*], their heirs and assigns, upon the trusts following; (namely), UPON TRUST, in the first place, with or out of the rents and profits of the said devised estates, or by mortgaging (*a*) or charging the same or a competent part or parts thereof, to raise, in aid of my personal estate (if insufficient), so much money as shall be requisite to satisfy my funeral and testamen-

Devise of freeholds and copyholds to trustees;

—upon trust to raise money by mortgage, in aid of the personal estate, to pay debts, &c.

(*a*) The object of providing a fund, in aid of the personal estate, may be attained by limiting a term of years only to the trustees; but while that plan has the advantage of giving legal estates to the ulterior takers, and consequently of superseding the necessity for a future conveyance by the trustees, it is not so well adapted to the present mode of framing mortgages, which are commonly made to embrace the fee-simple. And it is besides objectionable, where a sale is contemplated, inasmuch as the lands cannot be sold for a term of years, however long, so as to obtain the full value of the fee; and, of course, the reversion after a term of, say, 500 years, is worthless.

Of limiting a term to raise money for payment of debts and legacies.

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tary expenses and debts (*b*), and the annuities and pecuniary legacies hereinafter bequeathed, together with the expenses of

Freehold and copyhold estates of deceased persons subjected to their simple contract debts.

(*b*) By 3 & 4 Will. 4, c. 104, the freehold and copyhold estates of persons dying on or since the 29th August, 1833, who have not by will charged their real estates with the payment of debts, are constituted assets to be administered in the Courts of Equity for the payment of debts, due as well on simple contract as on specialty; but the priority of specialty creditors is preserved; for it is provided, that creditors by specialty, in which the heirs are bound, shall be paid before any of the creditors by simple contract, or by specialty in which the heirs are not bound. Hence, though a testamentary provision for the payment of debts is not now dictated by the same imperative considerations as formerly, yet such provisions are still not without their use, not only as producing a more fair and equal distribution of the assets (creditors of every degree claiming under a general charge or trust being entitled *pari passu*), but also because such a provision, accompanied by a proper trust or power of sale, may supersede the necessity of resorting to a Court of Equity in order to effect a sale of the estate. That step is sometimes rendered necessary by the nature of the limitations to which the estate is subjected: as where the devise is to uses in strict settlement, or in any other manner in favour of unborn persons or minors, which precludes the possibility of an immediate sale without the aid of the Court, in all those cases which do not come within 22 & 23 Vict. c. 35, ss. 14—18. The 11 Geo. 4 & 1 Will. 4, c. 47, facilitated in such cases the conveyance of the legal estate, by enabling an infant heir or devisee (s. 11), or a tenant for life, or other person having a limited interest vested in him by devise (see *Beale v. Tennent*, 1 Drew. 65), or first executory devisee (s. 12) under the direction of the Court, and, after a decree for sale for payment of debts, to convey the fee-simple to a purchaser. The statute does not in terms provide for (1) the case of the devisee for life, or owner of the limited estate, or first executory devisee, being an infant; nor (2) does it authorize the Court to direct mortgages as well as sales of estates; nor (3) does it extend to the case of the fee being vested, subject to an executory devise, in the heir by descent or otherwise than by devise. In the two first of these particulars, the deficiency has been supplied by 2 & 3 Vict. c. 60, which also provides (s. 2), that the surplus of moneys arising from such sale or mortgage shall devolve in the same manner as the estate so sold or mortgaged would have done: and in the third particular, by 11 & 12 Vict. c. 87.

11 Geo. 4 & 1 Will. 4, c. 47.

2 & 3 Vict. c. 60.

11 & 12 Vict. c. 87.

Operation of 3 & 4 Will. 4, c. 104.

The operation of 3 & 4 Will. 4, c. 104, is co-extensive with a testamentary charge of debts; see *Hamer's Devises' Case* (2 D. M. & G. 373). It was not the object, nor is it the operation of the Act, to make the simple contract debts of a deceased person in the nature of mortgage debts or specific charges on his real estate; it makes the real estate assets for the payment of his debts, and those debts constitute a general charge upon the real estate, but not so that a *bond fide* purchaser from the heir or devisee

executing this trust, and to apply the money to be so raised accordingly; And, subject thereto, IN TRUST for my son [name]

—and, subject thereto,

is bound to see to the application of the purchase-money, as would be the case with a particular mortgage on the real estate, or any portion thereof (*Kinderley v. Jervis*, 22 Be. 1). The real estate being thus constituted assets to be administered by the Court, according to the priorities specified by the statute, all the incidents of assets attach; the real estate is consequently liable in the first place to pay the debts of the deceased debtor; subject thereto, it belongs to the heir or devisee, but he takes no beneficial interest except subject to and after payment of the debts of his deceased ancestor or testator (*ib.* 23). Consequently, judgment creditors of the heir or devisee (under 1 & 2 Vict. c. 110, s. 13) have no priority over the simple contract creditors of the ancestor or testator in respect of the descended or devised estate (*ib.* 34).

3 & 4 Will. 4, c. 104.

The Wills Act makes no alteration in the law which made real estate assets for the payment of debts (*Eddels v. Johnson*, 1 Gif. 22). The order of application of the several assets in the payment of debts is given, 2 Jarm. Wills, 588. But, with respect to residuary devises of real estate, see *Hensman v. Fryer* (L. R., 3 Ch. App. 420), where it was held that where the personal estate is insufficient for the payment of debts and legacies, pecuniary legatees and the residuary devisee contribute rateably to the payment of the debts which the general personal estate is insufficient to satisfy. (The case is under appeal to the House of Lords).

Order in which funds to be applied in payment of testator's debts.

A testator ought never to devise real estate to infants or unborn persons, until he has made ample provision for the payment of his debts; and where such provision is made out of real estate, means should, notwithstanding the Act 22 & 23 Vict. c. 35, be also expressly provided for effecting a sale or mortgage, or both, under trusts or powers properly framed for the purpose. Formerly, this precaution was requisite only where there were creditors by specialty, or the testator's lands were by the will subjected to the payment of debts, but under the existing law, it applies with equal force whether there is any such charge or not, as creditors by simple contract are entitled (as before mentioned), in the absence of any express charge, to have the estate made available for their debts by means of a sale, under the direction of the Court; though it is to be observed that creditors, whose claims are founded on the recent statute, have no lien on the estate in the hands of an alienee of the heir or devisee, which creates an important difference between such creditors and those who claim under a general charge; though, even in the latter case, a purchaser for money or a mortgagee is exempt from seeing to the application of the money.

Provision should be made for payment of debts, before realty devised to infants.

See further as to the liability of lands in fee simple to debts, the note to *Taltarum's* and *Seymour's* cases, in Tud. L. C. R. P. 648; as to equitable assets, *Silk v. Prime*, and the notes thereon in 2 Tud. L. C. Eq. 95; and as to the distinction between equitable and legal assets, *Cook v. Gregson* (3 Drew. 547); *Mutlow v. Mutlow* (4 De G. & J. 539); Wms. Real Assets, 6; and see *Attorney-General v. Brunning* (8 H. L. C. 256, 258, 265).

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in trust for
testator's son
and his issue,
in strict set-
tlement;
and, failing
such issue,

—upon trust
to raise and
pay certain
sums; and,
subject
thereto,

—in trust for
collateral re-
lations.

Power to
lease.

and his assigns during his life, without (as to the said freehold hereditaments) impeachment of waste (*c*); And immediately after his decease IN TRUST for the first and every other son successively, according to seniority of birth, of my said son, and the heirs [*or*, heirs male] of the body of each such son; And, failing such issue, IN TRUST for the daughters of my said son, equally, as tenants in common, and the heirs of their respective bodies, with trust limitations in the nature of cross remainders between such daughters and the heirs of their respective bodies, as to both the original and the accruing shares; And, failing such issue, UPON TRUST, with or out of the rents and profits of the said devised estates, or by mortgaging or charging the same or a competent part or parts thereof, to raise and pay to the respective persons or classes of persons next hereinafter named or described, if living at the time of the failure of the antecedent trusts, the respective sums of money which immediately follow their respective names or descriptions, (that is to say) [*name*, &c.], £—; [*name*, &c.], £—, &c.; The children of my sister [*name*], who, either before or after the time last mentioned, being a son or sons, shall attain the age of twenty-one years, or, being a daughter or daughters, shall attain that age or be married, £— apiece; The children of, &c., £— apiece; And, subject thereto, as to one undivided moiety of my said devised estates, IN TRUST for my brother [*name*], his heirs and assigns; And as to the other undivided moiety thereof, IN TRUST for my nephews [*names*], equally, as tenants in common, their respective heirs and assigns. AND I EMPOWER my trustees or trustee for the time being, during the life of my said son [*name*], with his consent in writing, and after his decease, and during the minority or respective minorities of any infant tenant or tenants in tail for the time being entitled under the trusts aforesaid, in the discretion of such trustees or trustee, to grant leases of my said devised estates or any part thereof, (but, as to my said copyhold estates (*d*), first obtaining the

Copyholds,
waste.

(*c*) This clause as to waste is properly confined to the freeholds, because waste, voluntary or permissive, unauthorized by the custom, works a forfeiture of copyholds (Co. Litt. 60, a).

Copyholds,
lease, for-
feiture.

(*d*) In the absence of a special custom to the contrary, a copyholder can, without licence, lease only from year to year (Burt. Comp. § 1313).

requisite licence or licences), for a term or terms not exceeding [twenty-one] years in possession, at the best rent or rents, to be incident to the immediate reversion, without taking any fine or premium. I DEVISE the leasehold messuage in which I now reside, situate at—, and held by me under a lease dated, &c. (e), with the appurtenances, to my wife [name], for her life, if my term therein shall so long endure, and, after her decease, to my said son [name], his executors, administrators and assigns, for the then residue, if any, of such term. I BEQUEATH the several specific legacies following, (namely): To my said wife, all the wines, liquors, fuel and other consumable household stores and provisions which shall belong to me at my decease, for her absolute use; To, &c. I BEQUEATH to the several persons next hereinafter named, for their respective lives, the several annuities which follow their respective names, (that is to say): To my said wife £—— a year, in addition to the provision made for her by the settlement on our marriage; To each of my sisters [names], £—— a year; To, &c. AND I DIRECT such annuities to be paid in equal portions on the four usual quarterly days of payment of rent, and the first portion to be paid on such of the said days as shall occur next after my decease; but proportionate parts of the said annuities shall not be payable for the days elapsed at the deaths of the respective annuitants of the then current quarter (f): AND I DIRECT funds to be appropriated in the names or name of my trustees or trustee for the time being, out of my personal estate, (but not by mortgaging or charging my real estate), sufficient, at the period of appropriation, to answer, by means of the income thereof, the payment of the same annuities; which funds, on the dropping of the respective annuities, shall follow the destination of the residue of my personal estate. I BEQUEATH to the several persons next hereinafter named the several legacies which

Bequest of leasehold dwelling-house to wife for life, and then to testator's son absolutely.

Bequest of specific legacies.

Bequest of annuities;

with direction to set apart funds.

Bequest of pecuniary legacies.

A lease for a longer term works a forfeiture; but a mere covenant or agreement for such a lease does not (1 Cr. Dig. pp. 319, 320).

(e) This reference to the lease is added in order more decisively to exclude any other leasehold residence to which the testator may remove in the same locality from the operation of the devise. (See 1 Vict. c. 26, s. 24, *ante*, p. 43.)

(f) See *ante*, p. 158, n. (g).

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follow their respective names, (that is to say): To my niece [name], in addition to the provision made for her by the settlement executed by me on her marriage, the sum of £ —; To my niece [name], the sum of £ —, in satisfaction of a legacy bequeathed to her by the will of —, and received by me; To my nephew [name], the sum of £ —, which legacy, together with the sum of £ —, advanced by me for the purchase of his commission in the army, makes up the sum of £ —, which I originally promised to leave him: And I DIRECT the said pecuniary legacies to be paid at the end of — calendar months next after my decease. AND I DECLARE that such of the annuities and pecuniary legacies hereinbefore bequeathed as shall lapse (g) or fail by the deaths of legatees in my lifetime, or otherwise, shall, so far as the same may charge or affect my real estate, lapse or fail for the benefit of my devisees, and not of my heir (h). I BEQUEATH the residue of my personal estate

Destination
of lapsed
legacies.

Bequest of

(g) See 1 Vict. c. 26, ss. 32, 33, *ante*, p. 56.

Lapse of
personal
legacies.

Pecuniary
charges on
land.
Rules under
the old law.
Charge on
contingency
which never
happens.

Charge fail-
ing by lapse,
or void *ab*
initio.

(h) Legacies payable out of the general personal estate, failing from illegality, or lapsing by the death of the legatee in the testator's lifetime, sink into the residuary personal estate (*Brown v. Higgs*, 4 Ves. 708). But the destination of sums payable out of real estate, the gift of which fails under similar circumstances, admits of several important distinctions. The result of the cases, in regard to wills which are subject to the old law, is exhibited in the following propositions:—1st. Where a sum of money charged upon land is made payable on a contingency which does not happen (whether such failure of event occurs in the testator's lifetime or afterwards), the legacy becomes extinct for the benefit of the devisee of the land (see *Tregonwell v. Sydenham*, 3 Dow, 212). In this class are to be ranked general charges of debts and legacies, which, as they affect the land, unless a contrary intention appears, only in the event of a deficiency in the personal estate, are to be regarded as contingent charges (see *Noel v. Lord Henley*, 7 Pri. 241). 2ndly. Where the gift of a sum of money charged on land fails by lapse, in consequence of the legatee's death in the testator's lifetime, or where lands are charged with a sum of money which is given to a charity, or is devoted to some other illegal or impracticable purpose, invalidating the gift *ab initio*, the question between the heir and devisee is involved in much uncertainty. The authorities in favour of the heir are, *Arnold v. Chapman* (1 Ves. s. 108); *Bland v. Wilkins* (cit. 1 Br. C. 61); *Gravenor v. Hallum* (2 Amb. 643); and *Henchman v. Attorney-General* (2 S. & S. 498; but see 3 M. & K. 485). Those which support the claim of the devisee are *Wright v. Row* (1 Br. C. 61); *Jackson v. Hurlock* (2 Ed. 263); *Barrington v. Hereford* (cit. 1

unto my said son [*name*], for his absolute benefit. I DEVISE all the real estates vested in me as mortgagee or trustee to my

residue to son.
Devise of es-

Br. C. 61); *Baker v. Hall* (12 Ves. 497); *Cooke v. Stationers' Co.* (3 M. & K. 262); *Ridgway v. Woodhouse* (7 Be. 437); *Re Cooper's Trusts* (4 D. M. & G. 757); *Heptinstall v. Gott* (2 J. & H. 449). Thus the preponderance of recent cases is in favour of the devisee. In *Gravenor v. Hallum*, *Wright v. Row*, *Barrington v. Hereford*, and *Baker v. Hall*, the charge was of an annual sum. 3rdly. The destination of sums directed to be paid out of the produce of real estate devised to be sold, in the event of the gift of such sums failing by lapse or otherwise, is a distinct, and has often formed a no less perplexing topic of judicial consideration. Notwithstanding the conflict of authorities, the better opinion seems to be, that where part of the produce of land devised to be sold is directed to be applied to purposes which fail, either by lapse or on account of illegality, the heir-at-law, and not the residuary devisee of the produce, is entitled to the benefit of the failure (*Jones v. Mitchell*, 1 S. & S. 290; see also *Hutcheson v. Hammond*, 3 Br. C. 128; *Collins v. Wakeman*, 2 Ves. j. 683; *Gibbs v. Rumsey*, 2 V. & B. 294; *sed contra*, *Page v. Leapingwell*, 18 Ves. 463; *Noel v. Lord Henley*, 7 Pri. 240, 1 Dan. 211, 322; see also *Doe v. Sheffield*, 13 Ea. 527; *Williams v. Goodtitle*, 10 B. & C. 895). 4thly. Where money, arising from land directed to be sold, is given over on an event which does not happen, it descends to the heir (*Jessop v. Watson*, 1 M. & K. 665; see also *Fitch v. Weber*, 6 Ha. 145; *Roberts v. Walker*, 1 R. & M. 752). 5thly. Where the testator has blended the produce of his real estate, directed to be converted, with his personal estate, this has, in many cases, been considered sufficient to exclude the heir, in favour of the residuary legatee of the mixed fund, from all benefit arising from the lapse or failure *ab initio* of legacies payable out of the mixed fund: the testator, in such a case, was considered to have indicated an intention that the destination of the lapsed or void legacies should be regulated by the rule applicable to personalty (*Mallabar v. Mallabar*, Ca. t. Talb. 79; *Durour v. Motteux*, 1 Ves. s. 320; *Kennell v. Abbott*, 4 Ves. 802; *Green v. Jackson*, 5 Rus. 35, 2 R. & M. 238; *Cooke v. Stationers' Co.*, 3 M. & K. 262). But in order to give the benefit of the failure to the residuary legatee, the direction to convert the realty into personalty must be absolute; it must be expressly declared that such conversion is to be for all purposes and to all intents, or if the intention that the proceeds of the conversion should pass under the residuary bequest of personalty is left to inference, it will be inferred only from expressions irresistibly leading to such a conclusion (see *Maugham v. Maugham*, 1 V. & B. 410). A mere direction to sell land for a particular purpose (notwithstanding the cases previously cited), is not a sufficient indication of a testator's intention to convert realty into personalty to all intents; for the cases of *Collins v. Wakeman* (2 Ves. j. 683), *Gibbs v. Rumsey* (2 V. & B. 294), and *Amphlett v. Parke* (2 R. & M. 221), decide that, even though

Benefit of failure, to the devisee.

Lands directed to be sold, gift out of proceeds lapsing or void,

the heir entitled to benefit of failure.

Gift, on contingency not happening; to the heir.

Realty and personalty blended.

Benefit of failure to the residuary legatee,

where the conversion is absolute.

But when this is not the case,

lapsed or void legacies, so far as

Prec. XI.

tates held as mortgagee or trustee.

said trustees, their heirs and assigns, subject to the trusts and equities affecting the same respectively. I DECLARE that any

arising from sale of realty result to the heir.

Failure of gift of residue of proceeds of realty directed to be sold.

Conversion for the purposes of the will only.

Intestacy, as to lapsed or void portions of residue.

the real and personal estate be blended, lapsed or void legacies, so far as they arise from the sale of the realty, result to the heir-at-law. See also *Salt v. Chattaway* (3 Be. 576); *Taylor v. Taylor* (3 D. M. & G. 190). 6thly. Where the gift of the residue of the proceeds of real estate directed to be sold, or an aliquot share in such residue, fails, whether as void *ab initio*, or subsequently from lapse, the heir is clearly entitled as against the next of kin (*Ackroyd v. Smithson*, 1 Br. C. 503). The conversion directed is held to be a conversion for the purposes of the will; and those purposes having failed, the testator dies intestate, as to the residue, which, as arising from real estate descends to the heir-at-law. "Every conversion, however absolute in its terms, will be deemed to be a conversion for the purposes of the will only, unless the testator distinctly indicates an intention that it is, on the failure of those purposes, to prevail as between the persons on whom the law casts the real and personal property of an intestate, viz.: the heir and next of kin" (1 Jarm. Wills, 590). Thus in *Fitch v. Weber* (6 Ha. 145), notwithstanding a direction in the will that the trustees should stand possessed of the proceeds of the sale of real estates as a fund of personal and not of real estate, for which purpose such proceeds, or any part thereof, should not, in any event, lapse or result for the benefit of the heir-at-law, it was held that the heir-at-law was entitled to the proceeds of the real estate undisposed of by the will. See also *Flint v. Warren* (14 Sim. 554, 16 Sim. 124); *Bromley v. Wright* (7 Ha. 334); *Johnson v. Johnson* (4 Be. 318); *Sheddon v. Goodrich* (8 Ves. 481); *Hooper v. Goodwin* (18 Ves. 156); *Gallini v. Noble* (3 Mer. 691); *Shallcross v. Wright* (12 Be. 505). The case of *Phillips v. Phillips* (1 M. & K. 649) is against the claim of the heir; but is now overruled by *Taylor v. Taylor* (3 D. M. & G. 190). See further, on this contest between the heir-at-law and next of kin, the argument of Lord Eldon (then Mr. Scott), characterized by Lord Cottenham as one of the ablest arguments ever addressed to any court, in *Ackroyd v. Smithson* (4 Wh. & Tud. L. C. Eq. 783), and the note of the learned editors. 7thly. A distinction has been taken between the case where land is devised charged with the payment of a sum of money, and those where the devise is only an exception from the general residuary devise: "If a devise to a particular person, or for a particular purpose, be intended by the testator to be an exception from the gift to the residuary devisee, the heir takes the benefit of the failure; but if it be intended to be a charge only upon the estate devised, and not an exception from the gift, the devisee will be entitled to the benefit of the failure" (*Cooke v. Stationers' Co.*, 3 M. & K. 264). See also *Re Cooper's Trusts* (4 D. M. & G. 757); *Tucker v. Kayess* (4 K. & J. 339); *Heptinstall v. Gott* (2 J. & H. 449). This, it will be observed, is consistent with what has been laid down in the earlier part of this note.

Distinction between a charge upon, and an exception from, a devise.

New enactment as to

In such a conflicting state of the authorities, the subject to which they

mortgage made by the trustees or trustee for the time being of my will may, in their or his discretion, contain a power of sale; and that every mortgage and charge to be made or created by my trustees or trustee for the time being shall, in favour of the mortgagee or lender, be presumed to be necessary and proper (*i*). I EMPOWER my said son [*name*], during his life, and, after his decease, the trustees or trustee for the time being of my will, if any, or, if none, the executors or administrators of the last deceased trustee, or either or any of such executors or administrators, [*or*, the acting executors or executor for the time being, or the administrators or administrator for the time being, of the

Power to appoint trustees.

relate seemed not undeserving the attention of the framers of the Wills Act, which accordingly does appear to have fixed the destination of the interests in question in certain cases; see sect. 25, *ante*, p. 47.

gifts of land lapsing or failing.

The following supposed case will supply a simple illustration of the application of the statutory provision. A testator, by a will made on or after the first of January, 1838, devises certain lands to A. in fee, charged with the payment of £500 to B., and gives his residuary real estate to C.; B. dies in the testator's lifetime, or the gift to him is void *ab initio*, as being made for a charitable purpose, &c.: the legacy of £500 is clearly an interest in land within the meaning of the statute, and, as such, devolves to C., the general residuary devisee, instead of being (as formerly) a subject of contention between the testator's heir and A., the devisee of the charged lands.

Illustration of the new enactment.

If, however, the will contain no residuary devise, the enactment does not apply, and the question may still occur (as formerly) between the old competitors, the heir and the devisee of the land. It is evident, therefore, that the Wills Act has not entirely prevented the occurrence of the perplexing questions adverted to in the present note, even under wills made on or after the 1st January, 1838; and wills antecedently made, it will be remembered, are not within its operation. It should be observed, also, that the statute does not apply, where a sum of money charged upon land is payable on a contingency which does not happen; for as the failure of the gift of the money is owing to the failure of the event on which it is to take effect, there is no undisposed of interest on which the statute can operate. In the event, which has occurred, the land is not charged at all, and the devisee takes it in the same manner as if no charge had been inserted in the will. (Compare prop. 1 of this note, *ante*, p. 170.)

What cases not within the Act.

See also, as to the doctrine of lapse, 1 Jarm. Wills, ch. 11, and the notes to *Elliot v. Davenport* (1 P. W. 83), in Tud. L. C. R. P. 803—818.

(*i*) See *ante*, p. 115, n. (*b*). The latter branch of this clause is necessary notwithstanding the statutory powers conferred by the Acts named in the note referred to.

Prec. XI.

Appointment
of executors.

— last deceased trustee] from time to time to nominate, in writing (*k*), any person or persons to supply the place of any trustee or trustees of my will who shall die, whether in my lifetime or after my decease, or disclaim, or be unable or unfit to act, or desire to retire from the office; And on every such appointment the necessary assurances shall be executed for vesting my trust estate in the new and old trustees, or in the new trustees solely, as the case may be. I APPOINT the said [*trustees*] to be executors of my will. AND, LASTLY, I REVOKE all former wills, declaring this writing alone to express the whole of my will. IN WITNESS, &c.

(*k*) The power, *ante*, p. 163, is exerciseable by deed only, which is the preferable course.

No. XII.

WILL of a BACHELOR, disposing of Real Estate in favour of collateral Relations, to Uses for preventing Dower, and other Limitations; Part being in Mortgage.—Specific and Pecuniary Legacies and Life Annuities.—Various Trusts declared of several of the Pecuniary Legacies and Annuities, in favour of Nephews and Nieces and other collateral Relations.—Trust for an Imbecile.—Residue divided among Testator's Brothers and Sisters, and settled on them and their Families; with cross Limitations between the Stocks; and with ultimate Limitations to the Brothers, and to the Appointees and Next of Kin of the Sisters, of their respective original Shares.

THIS IS THE LAST WILL AND TESTAMENT of me, [*testator's name, residence and quality*](a). I APPOINT [*names, &c.*]

Executors
and trustees.

(a) In the first edition of this work, the present will was made to take effect only in the event of the testator's dying without leaving a widow or issue; but now that all wills (save those within the exception contained in sect. 18, *ante*, pp. 30, 31) are absolutely revoked by marriage, such a provision is unnecessary. Under the old law the general rule was (1) that a man's will was revoked by his subsequent marriage and birth of a child (6 Cr. Dig. p. 89, s. 45), and (2) that a woman's will was revoked by her marriage alone (*ib.* p. 92, s. 57). But this rule was subject to many exceptions. Thus, marriage and the birth of a child did not revoke a man's will if the will provided for the wife and children (*Kenebel v. Scrafton*, 2 Ea. 530; and see 1 V. & B. 465). But no such distinction is now recognised; and where a person before marriage makes a will (as is sometimes done) in favour of his intended wife, the will, in spite of the strongest indication or declaration of a contrary intention, will be revoked by the marriage. In such cases, therefore, the testamentary act should be deferred until after the marriage. There were some unsettled points which were connected with the old doctrine (and which of course may still arise under wills made before 1838), namely, whether the children must proceed from the posterior marriage (*Gibbons v. Caunt*, 4 Ves. 848); whether it applies

Revocation
by marriage.

Rule under
the old law.

Exceptions.

Prec. XII.

—
Burial and
funeral.

Devise in fee.

Devise to
uses to pre-
vent dower.

to be executors and trustees of my will. I DESIRE that my body may be buried in the family vault at —, with plainness and privacy. I DEVISE the freehold messuage, lands and hereditaments at —, in the county of —, which I lately purchased from [name], with their actual and reputed appurtenances, to my brother [name], in fee simple. I DEVISE the freehold messuages, lands and hereditaments at —, in the county of —, devised to me by my late uncle [name], with their actual and reputed appurtenances, to such persons, for such estates, and in such manner, as my brother [name] shall by deed appoint (b); And in default of appointment, to him and his assigns for his life, without impeachment of waste; And on the determination of his estate in his lifetime, to my trustees hereinbefore named, their executors and administrators, for his life, in trust for him; And on the determination of the

Revocation
by marriage,
under the old
law.

where the will disposes of less than the whole estate (see *Brady v. Cubitt*, Doug. 31); and as to the effect, in reference to wills of real estate, of a provision for the children by settlement or otherwise. It was also for a long period doubtful whether the revocation might not be negatived by parol evidence of a contrary intention (see 4 Ves. 848, 5 Ves. 663; 2 Ea. 530): but this point was set at rest by the case of *Marston v. Roe* (8 A. & E. 14), in which the Judges unanimously decided against the admissibility of the evidence, so far at least as respects devises of freehold estates. As to personal estate, the Ecclesiastical Courts continued to admit such evidence (*Fox v. Marston*, 1 Cur. 494), but the practice was subsequently altered in conformity with *Marston v. Roe*; see *Israell v. Rodon* (2 Moo. P. C. 51), *Matson v. Magrath* (1 Rob. 680, 6 No. Cas. 709, 13 Jur. 350), *Re Cadymold* (1 Sw. & Tr. 34). Again, a will was held not to be revoked by subsequent marriage and the birth of a child, where the after-born child would derive no benefit from the revocation. Thus, the birth of a child by a second wife did not revoke a will of freehold estate, there being a son by the first wife who would take the estate by descent if the will were revoked (*Sheath v. York*, 1 V. & B. 390): see also *Ex parte Lord Ilchester* (7 Ves. 348). In such a case, the will was revoked as to the personal estate, and remained in force as to the realty.

Will before,
marriage
after, 1 Jan.
1838.

If the will were made before 1 January, 1838, and the marriage took place on or after that day, the will is unrevoked by the marriage (*Lord Langford v. Little*, 2 J. & L. 613, 633; *Re Shirley*, 2 Cur. 657), but of course would be revoked by marriage and birth of a child.

See further, on revocation by marriage, 1 Jarm. Wills, 114, *et seq.*

(b) That the learning of uses is applicable to devises by will to uses, see 2 Jarm. Wills, ch. 34; Sugd. Pow. 146; 1 Sand. Uses, 250—253; Sugd. Gilb. Uses, 356.

Prec. XII.

estate of the said trustees, to him in fee simple. I DECLARE that all mortgages and other incumbrances which shall at my decease charge or affect my freehold hereditaments lastly hereinbefore devised, or any part thereof, alone or together with other hereditaments, shall be deemed to be wholly and exclusively charged upon and payable out of the hereditaments lastly hereinbefore devised, in exoneration of all my other real estate, and of my personal estate. I DEVISE my freehold farm called —, in the parish of —, in the county of —, which descended to me as heir-at-law of my uncle [name], with the actual and reputed appurtenances, unto my brother [name], and his assigns, for his life, without impeachment of waste, and on his decease to his son, my nephew [name], in fee simple; AND I EMPOWER my same brother during his life by deed to lease the same farm or any part thereof, for any term or terms in possession, not exceeding [twenty-one] years from the making of the lease, at the best rent, without taking any fine or premium (c). I DEVISE all my freehold hereditaments in the

—
Mortgaged
estate to be
taken cum
onera.

Devise for
life;

—remainder
in fee;
—power to
lease;

Devise for
life;

(c) In the absence of any power and of an express declaration to the contrary, a tenant for life under a will can now lease for twenty-one years by virtue of the provisions of 19 & 20 Vict. c. 120, s. 32, which enacts that—"It shall be lawful for any person entitled to the possession or to the receipt of the rents and profits of any settled estates for an estate for life or for a term of years determinable with his life, or for any greater estate either in his own right or in right of his wife, unless the settlement (which includes a will, see sect. 1) shall contain an express declaration that it shall not be lawful for such person to make such demise; and also for any person entitled to the possession or to the receipt of the rents and profits of any unsettled estates as tenant by the curtesy or in dower, or in right of a wife who is seised in fee, without any application to the Court, to demise the same or any part thereof, except the principal mansion house and the demesnes thereof and other lands usually occupied therewith, from time to time for any term not exceeding twenty-one years, to take effect in possession; provided that every such demise be made by deed, and the best rent that can reasonably be obtained be thereby reserved, without any fine or other benefit in the nature of a fine, which rent shall be incident to the immediate reversion; and provided that such demise be not made without impeachment of waste, and do contain a covenant for payment of the rent, and such other usual and proper covenants as the lessor shall think fit, and also a condition of re-entry on non-payment for a period not less (*sic*) than twenty-eight days of the rent thereby reserved, and on non-observance of any of the covenants or conditions therein

Tenant for
life, power
to lease.

19 & 20 Vict.
c. 120, s. 32.

Prec. XII.

—remainder
for life;

—remainder
to several in
common in
tail, with
cross-re-
mainders;

county of —, with the appurtenances therewith usually occupied or enjoyed, unto my brother [*name*], and his assigns, for his life, without impeachment of waste; And on his decease, to his wife [*name*], and her assigns, for her life, without impeachment of waste; And on her decease, To their four children [*names*] equally as tenants in common in tail; And on failure of the issue of each of such children, as to his or her share, To the others of them equally as tenants in common in tail by way of cross-remainder; with like cross-remainders in tail as to the shares taken by way of cross-remainder (*d*); And on failure of the issue of all such children, [*or, more shortly*, To their four children [*names*], equally as tenants in

contained; and provided a counterpart of every deed of lease be executed by the lessee."

As to the
mode of
limiting
cross-re-
mainders.

(*d*) The common form of limiting cross-remainders runs thus:—"And in case the issue of any of the said children shall fail, then as to as well the original share or shares of the child or children whose issue shall so fail, as the share or shares to which such child or children may become entitled under this limitation of cross-remainders, to the use of the others or other of the said children, and if more than one, in equal shares," &c. The language of this form, however, has arisen from an inaccurate conception of the nature of cross-remainders, under which there is a present limitation to each (present in point of interest, though future in point of enjoyment) of vested estates tail, more or less remote, in the shares of all the rest; so that each child *in esse* is tenant in tail of the whole; namely, as to one share, either in possession or in remainder immediately expectant on the estates, if any, limited prior to the limitation to the children, and as to the other shares in remainder, expectant on those estates, if any, and on the estates tail of the other children. The proximate share, and the more remote shares of each, are in effect, and (it is conceived) ought to be in express terms, limited over, on failure of his or her issue, to all the rest; just as, in the ordinary course of limiting successive estates tail, Blackacre is limited to A. in tail, and, on failure of his issue, to B. in tail. Sometimes, with yet more inaccuracy, the words "survivors or survivor" are substituted for, or used in addition to, the words "others or other." The principle of these observations extends to cross executory limitations by way of use or trust. In general, the imperfections of such limitations, especially in wills, are helped by the Courts; and, indeed, it would be difficult to frame a short and comprehensive form of this kind, expressive of the whole technical import and effect of cross-remainders, in terms so rigidly and critically correct, as not to require any liberality of construction. In a devise, however, all difficulty may be avoided by those who are content to adopt the summary form within brackets in the text.

"Survivors
or survivor."

Prec. XII.

common in tail, with cross-remainders between them in tail ; with remainder] To my nephew [*name*], in fee simple ; AND I EMPOWER my same brother during his life, and, after his decease, his said wife, whether covert or sole, during her life, to lease the same hereditaments, or any part thereof, for any term or terms in possession not exceeding [*twenty-one*] years from the making of the lease, at the best rent, without taking any fine or premium. I DEVISE my dwelling-house at —, in the parish of —, now in the occupation of my sister [*name*], with the appurtenances therewith usually occupied or enjoyed, to my said sister [*name*], so long as she shall occupy the same as her usual residence, and keep the same in tenantable repair, and insured in the sum of £ — at least against loss by fire ; And on the determination of her estate, To such of her daughters [*names*], as, being spinsters or a spinster, shall occupy the same as their or her usual residence, and shall keep the same in tenantable repair and insured as aforesaid, so long as they or she shall so occupy and keep the same ; And on the determination of their or her estate, To such persons, for such estates, and in such manner as my last-mentioned sister, whether sole or covert, shall by any deed or deeds or by her last will appoint ; And in default of appointment, To her son [*name*], in tail ; And on failure of his issue, to her said daughters equally (*e*), as tenants in common in fee simple. I DEVISE my freehold hereditaments at —, in the county of —, now in the occupation of [*name*] as tenant from year to year, with the appurtenances therewith usually occupied or enjoyed, to my nephews [*names*], equally as tenants in common in fee simple, with cross executory devises between them, so that in the event of any of them dying under the age of twenty-one years without leaving issue, the same hereditaments may go to the others, as tenants in common, or the other of them, in fee

—remainder in fee ;
—power to lease.

Devise to one for personal residence ;

—remainder to several, being spinsters, for personal residence ;

—remainder in tail ;

—remainder in common in fee.

Devise to several in common in fee, with cross-limitations, and a limitation over in thirds.

(*e*) That the words “equally,” “equally to be divided,” “to be distributed in joint and equal proportions,” “share and share alike,” “respectively ;” and to several “between” or “amongst” them, or to “each” of several persons, will create a tenancy in common in a will, see 2 Jarm. Wills, 237. As to a direction that younger children should “participate” with the eldest son, see *Liddard v. Liddard* (28 Be. 266). As to joint tenancy and tenancy in common, see *Morley v. Bird* (3 Ves. 629), and the notes on that case in Tud. L. C. R. P. 778 ; 2 Jarm. Wills, ch. 32.

Tenancy in common.

Joint-tenancy.

Prec. XII.

Devise to several in common for life, with cross-remainders;

—as survivor shall appoint;

—remainder to trustees, to sell and pay produce to children and issue, living at death of survivor *per stirpes*;

simple; But, in the event of their all so dying, as to one undivided third part of the same hereditaments, To my cousin [*name*], in fee simple; and as to the two remaining undivided third parts thereof, To my cousins [*names*], in equal shares, as tenants in common in fee simple. I DEVISE my freehold hereditaments at —, in the county of —, now in the occupation of [*name*] as tenant under a lease granted to him by me, with the actual and reputed appurtenances, to my nieces [*names*], equally as tenants in common, for their respective lives, without impeachment of waste; And on the death of each of them, as to her share and shares, original and accruing, to the others (*f*), equally as tenants in common, and the other of them, for their and her respective lives and life, without impeachment of waste; And on the decease of the survivor of them [*or, more shortly, to my nieces* [*names*] equally as tenants in common for life, with cross-remainders between them for life, with remainder] To such persons, for such estates, and in such manner as such survivor, either before or after her survivorship shall be ascertained, and whether sole or covert, shall by her last will appoint; And in default of such appointment, To my trustees hereinbefore named in fee simple, UPON TRUST, after the devise to them shall vest in possession, to sell the same hereditaments in such manner as they shall think fit, with power to make any special or other conditions as to the title or evidence of title or otherwise, and with power to buy in the premises at any public sale, and to rescind, either on terms or gratuitously, any contract, and to resell without being answerable for any loss, and to receive the sale moneys, and the rents until sale, (for which moneys and rents their receipts shall be effectual discharges), and pay the surplus thereof, after deducting their expenses, to or among such of the children of my last-mentioned nieces living at the decease of the survivor of them, and such of the issue then (*g*)

“Survivors.” (*f*) As the cross-remainders for life are intended to be vested and not contingent, the word “survivors” is better avoided. See *ante*, p. 178.

Whether substituted issue are, like their parents, to (*g*) Sometimes clauses, letting in the issue of children dying before a prescribed period, fail to express that the issue are to be substituted only in case they also outlive the period in question. A point of extreme

living of their children then deceased, as, either before or after the decease of such survivor, shall, being males or a male, attain the age of twenty-one years, or, being females or a female, attain that age or be married, to take, if more than one, as tenants in common, in a course of distribution according to the stocks, and not to the number of the individuals; the issue of deceased children taking by substitution, as tenants in common, the respective shares only which their respective parents would, if living, have taken; And if there shall not be any such child or issue, then to dispose of the same sale moneys as part of the residue of my personal estate hereinafter bequeathed, and to dispose of the same rents as part of the yearly income of such residue. I DEVISE all my other freehold hereditaments in the said county of —, with their actual and reputed appurtenances, to my four nieces [*names*], in equal shares, for their respective lives, without impeachment of waste; And on the decease of each niece, as to her share, To the children of the same niece living at her death, and the issue then living of her children then deceased, in fee simple, to take, if more than one, as tenants in common, according to the stocks, and not to the number of the individuals; the issue of deceased children taking by substitution, as tenants in common, the respective shares only which their respective parents would, if living, have taken; And if there shall not be any such child or issue, Then to such persons, for such estates, and in such manner as my same niece shall by her last will appoint; And in default of such appointment, To the others of my same nieces respectively in equal shares, for the same estates, and with the same sub-

—If none, to add the same to residue of personal estate.

Devise to several in common, for life;

—to the children and issue of tenant for life, *per stirpes*, in fee;

—remainder as tenant for life shall appoint, with cross-limitations between

nicety then arises, namely, whether the qualification expressly engrafted on the gift to the children is, by implication, to be extended to their issue. After great conflict of authorities, it has been decided that the substituted issue (in the absence of a contrary intention manifested by the context) are not required to outlive the period of distribution (*Martin v. Holgate*, L. R., 1 H. L. 175); see also 2 Jarm. Wills, 177; Hawkins, Constr. Wills, 253. But no interest vests in issue who pre-decease their parent (*Crause v. Cooper*, 1 J. & H. 207; *Humfrey v. Humfrey*, 2 Dr. & S. 49). And notwithstanding that the children take as tenants in common, the substituted issue will, in the absence of words of severance repeated in the gift to the issue, take in joint-tenancy amongst themselves (*Coe v. Bigg*, 1 N. R. 536).

outlive a period of distribution.

Prec. XII.

the tenants
for life and
their issue.

Devise of
rent-charge
payable
weekly, with
power of dis-
tress ;

—of land, so
charged, to
husband and
wife jointly
in fee ;

—charge to
cease on
alienation.

Bequest of
leaseholds to
one abso-
lutely.

Bequest of
leaseholds to
one for life,
remainder
absolutely.

Residuary
devise and
bequest of

sequent limitations (including this cross-limitation), as are herein expressed concerning their respective original shares ; And as to the entirety of the same hereditaments, on failure of all the limitations hereinbefore expressed, To my said brothers [*names*], as joint tenants in fee simple. I DEVISE my close called —, situate at —, with the actual and reputed appurtenances, to the intent that my nephew [*name*] may receive out of the rents and profits thereof an annuity or yearly sum of £ —, during his life, by weekly payments of £ — each, on Saturday in every week, clear of all deductions, the first of such payments to be made on the first Saturday after my decease ; and to the further intent that he may have the same or the like remedy by distress, for the recovery thereof, as landlords have for the recovery of rent in arrear upon common leases ; And, subject to the said annuity, and the said remedy for the recovery thereof, To my brother-in-law [*name*], and my sister [*name*], his wife, in fee simple. PROVIDED, that, if by reason of the act or default of the said [*annuitant*], or by operation of law, the said annuity of £ —, or any part thereof, shall be aliened, charged or disposed of, to or in favour of any other person or persons, then the same annuity shall thenceforth be paid to my said brother-in-law [*name*] and [*name*] his wife. I BEQUEATH my leasehold tenements at —, in the county of —, which I now hold under a lease from [*name*], with the actual and reputed appurtenances, to my brother [*name*], for such term as I may have therein at my decease, subject to the payment of the rent and performance of the covenants under which the same tenements may be held. I BEQUEATH my leasehold tenements at —, in the county of —, which I now hold under a lease from [*name*], with the actual and reputed appurtenances, to my brother [*name*], and his assigns, for his life, if such term as I may have therein at my decease shall so long endure, he or they paying the rent and performing the covenants under which the same tenements may be held ; And on his decease, if such term shall be then unexpired, To my nephew [*name*], his executors, administrators or assigns, for the then residue of the same term, subject to the payment of the same rent and performance of the same covenants. I DEVISE AND BEQUEATH the residue of the freehold hereditaments and leasehold tenements which shall belong

Prec. XII.

to me at my decease, with their respective actual and reputed appurtenances, to my said brother [name], as to the freehold hereditaments in fee simple, and as to the leasehold tenements for such terms as I may have therein respectively at my decease, subject to the payment of the rents and performance of the covenants under which the same may be respectively held, but charged, as to both the freehold and leasehold premises, with the payment to my executors or administrators, at the end of three calendar months from my decease, of the sum of £ —, to be disposed of as part of the residue of my personal estate hereinafter bequeathed. I BEQUEATH the specific legacies following, (namely): To my brother [name], my gold watch, with the chain and seals, requesting, but not imposing an obligation or creating a trust, that he will leave them, at his death, to my nephew [name]; To my nephew [name], all the printed books and manuscripts which shall belong to my library at my decease; To my old friend [name], my diamond ring, as a mark of my esteem; To [name], my gold snuff-box, in testimony of my grateful remembrance of his many professional and friendly services; To &c. I BEQUEATH the legacies following (namely): To the Rector for the time being of the parish of — aforesaid, £ —, to be distributed, at his discretion, among such poor inhabitants of that parish not receiving alms or parochial relief, as he shall select; To the Treasurer for the time being of the — Infirmary, in aid of that institution, £ —, for which the receipt of such treasurer shall be a sufficient discharge; To my nephew [name], or if he shall die in my lifetime, [*or, where it is doubtful whether the legatee be living or not*, or if he is now dead, or shall die in my lifetime], then to his executors or administrators (*h*), to be disposed of as part of his personal estate,

freeholds and leaseholds, to one absolutely, charged with a sum in augmentation of the residue of the personal estate.

Bequest of specific legacies.

Bequest of pecuniary legacies :
—to charitable uses ;

—to one, or on death in testator's lifetime, to his executors or administrators ;

(*h*) The construction of gifts to "legal" or "personal representatives," or to "executors or administrators," has been the subject of much controversy; the questions being (1) whether the gift to representatives applies to executors or administrators, or to the next of kin; and if to the former, then (2) whether the executors or administrators take the property beneficially, or only as part of the personal estate of the testator.

That the word "representatives" means the same as "legal personal representatives," see *Re Crawford* (2 Drew. 230); *Atherton v. Crowther* (19 Be. 449); *Re Henderson* (28 Be. 656). And that "legal represen-

Gifts to "legal" or "personal representatives," or to "executors or administrators," how construed.

Prec. XII.

—to classes
of persons,
with power to

£—; To such of my nephews and nieces [names], as shall be living at my decease, and if more than one, equally,

Gifts to per-
sonal repre-
sentatives.

tatives," "personal representatives," or "legal personal representatives," ordinarily and *primâ facie* mean "executors or administrators," see *Price v. Strange* (6 Mad. 159); *Smith v. Barneby* (2 Col. 728); *Re Turner* (2 Dr. & S. 501); Hawkins, Constr. Wills, 106. But the expressions "personal" and "legal representatives" are not necessarily identical in meaning (*Kilner v. Leech*, 10 Be. 362). See also *Topping v. Howard* (4 De G. & S. 268).

Executors or
administra-
tors not enti-
tled for their
own benefit.

To hold the executors or administrators to be beneficially entitled is so manifestly contrary to the probable intention, that the case of *Evans v. Charles* (1 Anstr. 128; see also *Churchill v. Dibben*, 9 Sim. 447), in which this construction prevailed, has been generally condemned: The Judge, whose solitary approbation it has elicited, did not think proper to follow its authority (see *Long v. Blackall*, 3 Ves. 486), and it is now overruled by several later cases. See *Long v. Watkinson*, 17 Be. 474; *Mapp v. Ellecock*, 3 H. L. C. 492; *Read v. Stedman*, 26 Be. 495; *Williams v. Roberts*, 4 Jur., N. S. 18.

1 Will. 4,
c. 40.

To hold the executors or administrators to be beneficially entitled would be more palpably absurd now, that, by express enactment (1 Will. 4, c. 40), executors are excluded from taking beneficially, by virtue of their office, even the undisposed-of personalty of their testator. Accordingly, in *Stocks v. Dodsley* (1 Ke. 325), where a testator bequeathed 500*l.* to B. after the death of A., and if B. should die in the lifetime of A., then to such persons as B. should by will appoint, and in default of such appointment, to the executors and administrators of B. absolutely; Lord Langdale, M. R., held that the executor of B. did not take beneficially, but was bound to apply the legacy according to the purposes of the will of B. See also *Morris v. Howes* (4 Ha. 599); *Dacre v. Patrickson* (1 Dr. & S. 182); *Juler v. Juler* (29 Be. 34); *Saltmarsh v. Barrett* (3 D. F. & J. 279); *Barrs v. Fewkes* (2 H. & M. 60); *Johnstone v. Hamilton* (6 N. R. 352).

Next of kin
under the
statute take,
when.

This question, however, cannot arise, unless it is adjudged that the executors or administrators are the intended objects of the gift, which seems not to be the invariable construction; for, in some cases, a gift to "legal" (*Price v. Strange*, 6 Mad. 159), or "personal representatives" (*Robinson v. Smith*, 6 Sim. 47), and even a gift to "executors or administrators" (*Palin v. Hills*, 1 M. & K. 470), has been held to apply to next of kin, who, as persons entitled under the Statute of Distributions to the personal estate of the deceased, may be said in a general and popular sense to "represent" him.

"Legal re-
presenta-
tives."

Thus, in *Bridge v. Abbot* (3 Br. C. 224), which is a leading authority for this construction (see also *Long v. Blackall*, 3 Ves. 486), a testatrix having made a bequest to certain persons, and in case of the death of any of them before her (the testatrix), to his or her "legal representatives," Sir R. P. Arden, M. R., held the next of kin under the statute to be

£ — ; To each of the children of my deceased nephew [name], who either before or after my death shall attain the age of ^{advance} minors.

entitled. It does not appear whether his Honour adverted to the case of a widow, and would have included her in his sense of legal representatives. (See *Price v. Strange*, 6 Mad. 162; *Reynell v. Reynell*, 10 Be. 21; *Booth v. Vicars*, 1 Col. 6). So, in *Bains v. Ottey* (1 M. & K. 465), where a testator gave certain real and personal estate to trustees, in trust for such persons as A., a married woman, should appoint, and in default of appointment for her separate use, and at her decease to convey the real estate to such person as would be the heir-at-law of the said A., and to assign the personal estate to such persons as would be the "personal representatives" of A., Sir J. Leach, M. R., held the next of kin under the statute to be entitled. See also *Re Grylls' Trusts* (L. R., 6 Eq. 589). Again, in *Cotton v. Cotton* (2 Be. 67), a bequest to several persons "or the legal representatives of the said" legatees, received the same construction. But see *Smith v. Barneby* (2 Col. 728). Indeed, so strong has been sometimes the leaning in favour of the construction which reads words pointing at succession or representation as denoting the next of kin, that (as already stated) even a gift to executors or administrators has been so construed. Thus, in the case of *Palin v. Hills* (1 M. & K. 470), where a testator, after bequeathing certain pecuniary legacies, declared, that in case of the death of any or either of the legatees, his or her legacy should go to his or her executors or administrators, Lord Chancellor Brougham decided in favour of the next of kin under the statute of the deceased legatee, on the authority of *Bridge v. Abbot*; his Lordship considering that a gift to executors or administrators was wholly undistinguishable from a gift to legal representatives. (Compare this with *Stocks v. Dodsley*, 1 Ke. 325, stated *ante*, p. 184. See also *Daniel v. Dudley*, 1 Ph. 1; *Taylor v. Beverley*, 1 Col. 108; *Jenkins v. Gower*, 2 Col. 537; *Wilkinson v. Garrett*, 2 Col. 643; *Say v. Creed*, 5 Ha. 580; *Long v. Watkinson*, 17 Be. 471; *Dixon v. Dixon*, 24 Be. 129; *King v. Cleveland*, 26 Be. 26, 166, 4 De G. & J. 477). A testator gave the interest of 1,000*l.* to his daughter for life, and after her death to her children; but if she died without issue (which happened) he gave the capital to his sons in equal shares, and declared that, if any of them should die in his daughter's lifetime, his or their share or shares should be paid to his or their "legal personal representatives;" two of the sons died in the daughter's lifetime; it was held that their executors were entitled to their shares as part of their personal estate in exclusion of their next of kin (*Hinchliffe v. Westwood*, 2 De G. & S. 216). But in *Walker v. Marquis of Camden* (16 Sim. 329), where the testator had several times, in other parts of his will, made use of the words "executors or administrators," it was held that, under a bequest to a person "if he should be then living, if not, then to his legal personal representative or representatives," the next of kin, and not the executors or

"Personal representatives."

"Executors or administrators."

"Legal personal representatives."

Prec. XII.

— twenty-one years, or marry, £—; with power for my executors or administrators to apply the whole or part of the legacy

Gifts to representatives.

administrators, were entitled. See also *Stockdale v. Nicholson* (L. R., 4 Eq. 359), where the gift was to "next personal representatives."

Residuary legatee.

In *Hewitson v. Todhunter* (22 L. J., Ch. 76), where a legacy was bequeathed to A., and in case he should die in the testator's lifetime (which happened), it was directed that the legacy should devolve upon A.'s "personal representatives," Sir J. Stuart, V.-C., decided against both the executor and the next of kin of A., and in favour of the residuary legatee of A. Compare the decision of Sir J. Leach, M. R., in *Palin v. Hills* (1 M. & K. 474), reversed, 1 M. & K. 479.

"Executors and administrators," &c., when words of limitation.

From cases of this class, however, we must carefully distinguish those in which the words "executors and administrators" or "legal representatives" are used as words of limitation, as in the case of a gift to A. and his executors or administrators, or to A. and his legal representatives, which will, beyond all question, vest the absolute interest in A. (*Lugar v. Harman*, 1 Cox, 250). But the same construction has not been applied to cases of a bequest to A. for life, and, after his decease, to his executors or administrators, without the word "assigns" (*Mackenzie v. Mackenzie*, 3 M. & G. 559; *Attorney-General v. Malkin*, 2 Ph. 64; *Re Seymour's Trusts*, Joh. 472; *Johnson v. Routh*, 6 W. R. 6: but see *Devall v. Dickens*, 9 Jur. 550; *Alger v. Parrott*, L. R., 3 Eq. 328); on the other hand, if there is the word "assigns" in the gift, that is, if the gift be to A. for life, and after his death to his "executors, administrators and assigns," A. would be entitled absolutely (*Meryon v. Collett*, 8 Be. 386; *Hames v. Hames*, 2 Ke. 646; *Morris v. Hones*, 4 Ha. 599. See also Co. Litt. 54, b; *Socket v. Wray*, 4 Br. C. 483; *Lewis v. Hopkins*, 3 Drew. 668, affirmed, nom. *Williams v. Lewis*, 6 H. L. C. 1013, 7 W. R. 349). In *Price v. Strange* (6 Mad. 159), where a testator devised real estate to his wife, during widowhood, and at her death or marriage to trustees to sell; and directed that in case the death or second marriage of his wife should not happen until his youngest child, being a son, should have attained twenty-three, or being a daughter, should have attained that age or be married with consent, then his trustees should, immediately after the receipt of the money arising from the sale of his said real estate, pay and divide the same among such of his children as should be then living, and the legal representative or representatives of such as should be then dead; and in case such death or marriage of his said wife should happen during the minority of any of his said children, then the testator directed the trustees to pay an equal proportion of the said money to such of his children as should at that time be entitled to receive their shares, in case he, she or they had been then living; and if dead, then to his, her or their legal representatives: Sir J. Leach, V.-C., was of opinion, that these words operated as words of limitation, and that a child attaining twenty-three, who died during the

of each child, while such legacy shall be contingent, for the advancement in life, or otherwise for the benefit of the same

widowhood of the wife, took a vested interest. It will be observed, that the construction adopted by Sir *J. Leach*, in the last case, makes no provision against lapse, and therefore the representatives of a child dying in the testator's lifetime would not have taken by way of substitution. So in the case of *Grafftey v. Humpage* (1 Be. 52), where, under a bequest to A. and B. and the survivor, for life, and on a certain contingency to such persons as B. should appoint, and in default of appointment to the executors, administrators or assigns of B., B. was held to be entitled absolutely. See also *Holloway v. Clarkson* (2 Ha. 521).

It is observable, that, in *Bridge v. Abbot*, *Baines v. Ottey*, and *Palin v. Hills*, the question did not arise, whether the gift to legal representatives, or executors or administrators, applied to the next of kin, in the strict and proper acceptation of that term, or to the persons taking the personal estate under the Statutes of Distribution, so as to let in the widow of the deceased and the representatives of next of kin, *i. e.*, the persons who are, among lineals of every degree, and collaterals of certain degrees of proximity, admitted to stand in the place of and represent their deceased parent or ancestor. It seems to be clear, that neither the widow (*Garrick v. Lord Camden*, 14 Ves. 372; *Lee v. Lee*, 8 W. R. 443; but see 4 W. R. 533, n.), nor the husband (*Milne v. Gilbert*, 5 D. M. & G. 510), is entitled under a gift in terms to the next of kin. The claim of the representatives of next of kin under such a gift, however, has been the subject of many conflicting decisions and dicta, terminating with the important case of *Elmsley v. Young* (2 M. & K. 82, 780), in which Lords Commissioners *Shadwell* and *Bosanquet*, after a full review of the authorities, decided in favour of the strict construction; those learned Judges being of opinion, that, under a gift to next of kin, a surviving brother was entitled, in exclusion of the children of a deceased brother. See also *Withy v. Mangles* (10 C. & F. 215), *Avison v. Simpson* (Joh. 43), *Rook v. Attorney-General* (31 Be. 313), and *Halton v. Foster* (L. R., 3 Ch. App. 505), where under gifts of personalty to "the next of kin" it was held that the nearest of kindred in blood were entitled, and not those who would be entitled under the Statutes of Distribution. And the nearest in blood, if more than one, take as joint tenants (*Stockdale v. Nicholson*, L. R., 4 Eq. 359). The terms "next of kin" and "next or nearest of blood" are synonymous (*Cooper v. Denison*, 13 Sim. 296).

Whether wife and representatives of next of kin entitled under gift to next of kin or its synonyms.

In *Scott v. Moore* (14 Sim. 35), the Court had to decide between the conflicting claims of the next of kin and the residuary legatee of a testator, under a declaration that a trust fund in a certain event should be considered as part of his personal estate, and go in due course of administration; the legatee was held entitled. And see *Hewitson v. Todhunter* (*ante*, p. 186).

Conflicting claims of next of kin and residuary legatee.

For the construction of a bequest "to and among my heirs-at-law, share and share alike," see *Ware v. Rowland* (2 Ph. 635). As to the effect of

Gifts to "heirs," "next of kin," &c.

Prec. XII.

Legacy to
each of se-

child during minority (*i*); To each of my nephews and nieces [*names*], the children of my said brother [*name*], by his late

Gifts to
"heirs,"
"next of
kin," &c.

a gift to the next of kin of testator's wife, according to the distribution of intestate's effects, where the wife of the testator had a previous life interest, see *Edwards v. Saloway* (2 Ph. 625). As to the construction of the words "heirs" and "family," as applicable to dispositions of real and personal estate respectively, *White v. Briggs* (2 Ph. 583); of "offspring," *Lister v. Tidd* (29 Be. 618); of "descendants," *Best v. Stonehewer* (34 Be. 66, 5 N. R. 500); of a gift of stock to "issue male," *Lywood v. Kimber* (29 Be. 38); and of a devise to the "first male heir," *Doe v. Perratt* (9 C. & F. 606); the words "eldest son" held to be words of limitation, *Lewis v. Puxley* (16 M. & W. 733; 16 L. J., N. S. Exch. 216). See also *Thellusson v. Lord Rendlesham* (7 H. L. C. 429); *Thellusson v. Robarts* (7 W. R. 563), where "eldest male lineal descendant" was held to mean the eldest in point of line or stock, and not of personal age; on the word "heir" in a bequest of personalty, *Doody v. Higgins* (2 K. & J. 729), *Re Gamboa's Trust* (4 K. & J. 756), *Re Rootes* (1 Dr. & S. 228), *Re Preston's Trusts* (1 N. R. 470), *Powell v. Boggis* (35 Be. 535), *Re Newton's Trusts* (L. R., 4 Eq. 171); as to "heir of my family," *Tetlow v. Ashton* (15 Jur. 213); for a gift to next of kin of a particular surname, *Carpenter v. Bott* (15 Sim. 606); a devise to right heirs of the testator's name, *Thorpe v. Thorpe* (1 H. & C. 326, 10 W. R. 778); to "my nearest of kin by way of heirship," *Williams v. Ashton* (1 J. & H. 115); to "next lawful heirs," *Haslewood v. Green* (28 Be. 1); as to the meaning of "next of kin in the male line," *Sayer v. Bradley* (5 H. L. C. 873); and as to the period of vesting of a devise to the person who "shall be the male relation nearest in blood" to A. the first tenant for life of a series of limitations, *Stert v. Platel* (5 Bing. N. C. 434, 7 Sc. 422).

On gifts to "family" or "relations," compare n. (*d*) to Prec. IX., *ante*, p. 147; see also on this subject, and generally on gifts to descendants, issue, next of kin, personal representatives, executors or administrators, and persons of testator's blood and name, 2 Jarn. Wills, ch. 29.

(*i*) An executor is not authorized, without an express direction, to pay even a vested legacy to, or apply it for the benefit of, a minor legatee; still less is he warranted in so dealing with a legacy which (like that in the text) is contingent until the majority of the legatee. But an executor can discharge himself of a legacy which belongs to an infant by paying it, as directed by the stat. 36 Geo. 3, c. 52, s. 32, into the Bank of England, to the account of the legatee, with the privity of the Accountant-General of the Court of Chancery, who is directed to give his certificate for the payment, on the production of the certificate of the Commissioners of Stamps that the legacy duty has been paid; see *Re Biggs* (11 Be. 27); and such payment does not make the infant a ward of Court (*Re Hillary*, 2 Dr. & S. 461). The Accountant-General is then to lay out the money in Three per Cent. Consols, which, with the dividends, are transferred and paid to

As to the
payment of
legacies to
minors.

Prec. XII.

wife [*name*], the sum of £——, to be vested in and payable to each nephew as and when he shall attain the age of twenty-one years, and to be vested in and payable to each niece as and when she shall attain that age or be married; AND I DIRECT each of the last-mentioned legacies to be, if vested and payable, paid, or, if not, retained and set apart, at the end of three calendar months next after my decease, but without interest in the mean time, and, if retained and set apart, to be invested in the names of my trustees, in or upon the public stocks or funds, or other Government securities of the United Kingdom, or real securities in the United Kingdom, or in or upon the bonds, debentures or debenture stock or guaranteed stock or shares of any railway company in England which at the time of the investments therein respectively shall be paying a dividend (and not in or upon any other investment), with power to vary the investment from time to time for any other or others of the like nature; and the yearly produce thereof to be paid into the hands of my said brother [*name*], during the minority of the nephew, or the minority and discoveriture of the niece, to whom the same shall belong, in order that such yearly produce may be applied by my said brother, at his discretion, for the benefit of such nephew or niece, and without his being obliged to render any account of the application thereof; And if my said brother shall die during such minority, or during such minority and discoveriture, then to be applied by my trustees, at their discretion, in or towards the maintenance and education, or otherwise for the benefit of such nephew or niece; and the unapplied yearly produce, if any, shall be accumulated, and the accumulations be added to the capital of the legacy whence the same shall have

veral infant nephews and nieces, with a direction to pay the income to the father for maintenance, without account, and after his death to apply it;

the legatee at majority, on application to the Court by petition or motion. In order to avoid the necessity of resorting to this proceeding, which of course is attended with some expense, it seems, in general, advisable to give to the executors, where the legacy is small, a power of applying it for the benefit of the legatee during his or her minority, unless the testator chooses absolutely to postpone his bounty until majority. The executor may also, in a proper case, pay the legacy into Court under the Trustees' Relief Act, 10 & 11 Vict. c. 96, s. 1, or the Trustee Act, 1850, 13 & 14 Vict. c. 60, s. 48; Consol. Ch. Ord. xli; Morgan's Ch. Acts & Orders, 64, 595. An order under the Trustees' Relief Act makes the infant a ward of Court (*Re Hodges' Settlement*, 3 K. & J. 213); but it would seem that the mere payment into Court does not.

—to trustees,
of several
sums of
money upon
trusts after
declared;
—to execu-
tors, for their
trouble;
—to indi-
vidual exe-
cutor;
—to friends,
for rings;
—to servants.

arisen, and follow the destination of the same legacy; AND I DECLARE that if my said nephews or any of them shall die under the age of twenty-one years, or my said nieces or any of them shall die under that age without having been married, then the legacies or legacy of such of them as shall so die, and the unapplied yearly produce and accumulations, if any, shall sink into the residue of my personal estate. AND I BEQUEATH to my said trustees, three several sums of 500*l.*, 1,000*l.* and 2,000*l.* upon the trusts hereinafter declared thereof respectively; To each of my executors £——, as an acknowledgment for the trouble of executing my will; To the said [*one of the executors*], individually, and without reference to his office (*h*), £——; To each of my friends [*names*], £——, to purchase a mourning ring or other memorial [*or*, To each &c. a mourning ring of the value of £——]; To my servant [*name*], if he shall continue in my service till my decease, £——; To each of the domestic servants who shall be in my service at my decease (except the said [*name*]), a sum equal to one year's wages (*l*), in addition

As to legacies
to executors.

(*h*) These words are inserted to show that the executor is to have the legacy whether he proves the will or not. See Hawkins, Constr. Wills, 309. The intention on this point should always be indicated in framing legacies to executors. The effect of declaring the legacy to be in consideration of the executor's trouble, and indeed of giving it simply to the executor without any explanatory declaration of the motive, would be to annex the legacy to the office (*Calvert v. Sebbon*, 4 Be. 222; *Slaney v. Watney*, L. R., 2 Eq. 418); and this probably is in general the intention. *Secus*, where it is expressed to be as a mark of esteem (*Burgess v. Burgess*, 1 Col. 367), or where it is given to one of the executors exclusively in addition to a previous legacy to all, though the bequest be to them *nomi- natim*, without any allusion to the office (*Cockerell v. Barber*, 2 Rus. 585). See also *Compton v. Blowham* (2 Col. 201); *Hollingsworth v. Grasett* (15 Sim. 52); *Wildes v. Davies* (1 S. & G. 475); *Angermann v. Ford* (29 Be. 349); *Re Denby* (3 D. F. & J. 350); 4 Dav. Conv. by Waley, 100.

Requests to
servants.

(*l*) A bequest to testator's "servants" includes those only who are in his service at his death (*Jones v. Henley*, 2 Ch. Rep. 162), and who pass their whole time in testator's service (*Townshend v. Windham*, 2 Ver. 546; *Thrupp v. Collett*, 26 Be. 147); though of course a temporary absence from actual service at the testator's death does not disentitle one otherwise entitled (*Herbert v. Reid*, 16 Ves. 486).

A bequest "to each of my servants one year's wages over and above what may be due to them at the time of my decease," is confined to servants hired by the year (*Booth v. Dean*, 1 M. & K. 560; *Blackwell v. Pen-*

to the wages then due to him or her, also a suit of mourning, to be provided by my executors at their discretion. I DIRECT the legacies of such of the pecuniary legatees as at the time of the actual payment thereof respectively shall be married women, to be paid into their respective proper hands, in order that the same may be enjoyed and disposed of as their separate property, free from marital control, for which legacies their respective receipts shall be discharges. I BEQUEATH the legacies of stock (*m*) following (namely): To my said trustees, 3,000*l*. Consolidated Three per Cent. Bank Annuities, also 4,000*l*. Reduced Three per Cent. Annuities, also 5,000*l*. New Three per Cent. Annuities, also 6,000*l*. Consolidated Three per Cent. Annuities, upon the trusts hereinafter declared thereof respectively; Also to my nephew [*name*], 1,000*l*. Bank Stock. I DIRECT my executors to deliver the specific legacies aforesaid within one calendar month from my decease, and to pay or retain

Legacies to married women to be their separate property.

Bequest of stock legacies.

Time fixed for delivery of specific legacies, and payment of pecuniary

nant, 9 Ha. 551). But if the bequest be of a gross sum to be divided amongst the servants, persons continuously employed at weekly wages are included (*Thrupp v. Collett*, *ubi sup.*).

Bequests to servants.

A gift to "servants in my domestic establishment," includes only in-door servants (*Ogle v. Morgan*, 1 D. M. & G. 359); and in *Jones v. Henley* (*ubi sup.*), where the gift was simply "100*l*. a piece to all my servants," it was held that those only were entitled who lived in the house with the testator. But in *Townshend v. Windham* (*ubi sup.*), the expression "such of my servants as shall be living with me at my death," was held not to exclude servants living in a different house; and similar decisions were given in *Blackwell v. Pennant* and *Thrupp v. Collett* (*ubi sup.*).

See also *Armstrong v. Clavering* (27 Be. 226); *Darlow v. Edwards* (1 H. & C. 547, 10 W. R. 700); *Venes v. Marriott* (10 W. R. 751).

(*m*) Stat. 8 & 9 Vict. c. 97, after reciting 1 Geo. 1, c. 19, enacts that all shares of public stocks standing in the names of any deceased person may be transferred by the executors or administrators of such person, notwithstanding any specific bequest or disposition thereof in the will of such person contained. No transfer is to be allowed without the probate or letters of administration being first left at the Bank of England; and all the executors who have proved the will are to join in every transfer. The Bank (sect. 2) is not to require the registration of specific bequests, as was the case previously. Sect. 3 provides for the receipt of dividends by power of attorney, when stock is standing in the name of an infant, or of a person of unsound mind, jointly with some other person not under legal disability. Sect. 4 enacts, that the word "stocks" shall extend to any stocks, funds, or annuities, which, at the date of the Act (4th Aug. 1845) or at any time thereafter, shall be transferable at the Bank of England.

Act to amend law respecting testamentary disposition of property in public funds.

Prec. XII.

and stock
legacies.

Charitable
legacies to be
paid prefer-
ably out of

the money (o) and stock legacies aforesaid within six calendar months after my decease, or sooner, if they shall think fit. I DIRECT that the aforesaid money legacies for charitable purposes shall be paid exclusively out of such part of my personal

Bequests of
stock.

(o) The word "money" in a will does not pass stock in the public funds, unless its meaning is enlarged by the context (*Lowe v. Thomas*, 5 D. M. & G. 315; *Dunally v. Dunally*, 6 Ir. Ch. Rep. 540), or it can be gathered from the whole will, and the facts of the case, that such was the testator's intention (*Chapman v. Reynolds*, 28 Be. 221; *Gover v. Davis*, 29 Be. 222). See also *Cowling v. Cowling* (26 Be. 449), where stock in the funds was held not to pass by a bequest of "my goods and furniture, my plate and linen, all money and notes that may be due to me at my decease." And the addition of "&c." to a bequest like the above, will carry only things *ejusdem generis* (*Newman v. Newman*, 26 Be. 220). But South Sea Stock and $3\frac{1}{4}$ per Cents. were held, on the context, to pass by the expression "surplus money" (*ib.* 219). And see *Barclay v. Muskeleyne* (Joh. 124); *Montagu v. Earl of Sandwich* (33 Be. 324); *Nevinson v. Lady Lennard* (34 Be. 487).

Et cætera.

In *Harrison v. Asher* (2 De G. & S. 436), a testator, resident in Jamaica, made a specific bequest of half of certain stock, and afterwards directed his agents in London, who held a power of attorney from him, to sell out part of the stock. The testator died before the sale was made, and the agents, in ignorance of that fact, effected the sale as directed. It was held that the legatee was entitled to half the stock which was standing in testator's name at the time of his death. See also *Thomas v. Thomas* (27 Be. 537), in which case the testator left to his grandson "all the bank stock which he should be possessed of or entitled to at the time of his death." On the 27th Dec. 1858, he directed the purchase of 5,000*l.* bank stock, obviously with a view of increasing the legacy to his grandson; the stock was bought at the earliest possible moment, but the testator died on the day of, but five hours before, the purchase. The grandson was held not to be entitled to the 5,000*l.*

Bank stock.

A bequest of "my bank stock" was held to pass $3\frac{1}{4}$ per cents., the testator having no other stock, either at the date of his will, or at his death (*Drake v. Martin*, 23 Be. 89). But where a testator has stock which answers the description in his will, though different in amount, the description will not be extended so as to include stock of a different description (*Gilliat v. Gilliat*, 28 Be. 481). In a gift of "the whole of my fortune now standing in the funds," bank stock was held not to be included (*Grainger v. Slingsby*, 8 D. M. & G. 385, 7 H. L. C. 273). Bank stock is not government security (*ib.*; *Mills v. Mills*, 7 Sim. 501; *Hume v. Richardson*, 10 W. R. 528). As to what securities are within the meaning of "stocks in the foreign funds, see *Ellis v. Eden* (23 Be. 543, 25 Be. 482); and that long annuities pass as "stock and money in the funds," see *Grant v. Mussett* (8 W. R. 330).

Foreign
funds.
Long an-
nuities.

Prec. XII.

estate as may lawfully be appropriated to such purposes, and preferably to any other payment thereout. I DIRECT my trustees to stand possessed of the said legacy of 500*l.* money, UPON TRUST to invest the same in their names in the public funds or on Government securities of the United Kingdom, or on the bonds, debentures, debenture stock or guaranteed stock or shares of any railway companies in England, Wales or Scotland, but not elsewhere, which railway companies shall respectively, at the time of the investment aforesaid, be paying dividends, or on real securities in England or Wales, but not in Ireland or elsewhere, and not in any other investment, with liberty to change the investment, at their discretion, for any other or others of the kinds prescribed, and to accumulate the yearly income by similar investments until my nephew [*name*] shall attain the age of twenty-one years, or die under that age; and if he shall attain that age, thereupon to transfer to him both the original fund and the accumulations; but if he shall die under that age, then to dispose thereof as part of the residue of my personal estate. I DIRECT my trustees to stand possessed of the said legacy of 1,000*l.* money, IN TRUST for my reputed son [*name*](*p*);

pure personality.

Trusts of a pecuniary legacy—to invest and accumulate till a nephew attains twenty-one, then to transfer the fund to him.

Trusts of another pecuniary legacy

(*p*) A gift to children or issue *primâ facie* imports legitimate children or issue (1 P. W. 529; 1 V. & B. 462). Hence, in framing provisions for illegitimate offspring, great care should be taken to show plainly and explicitly that they are the intended objects of the gift. And this suggestion loses none of its pertinency where there are no other than illegitimate children in existence at the making of the will; for, as a gift to children, generally, embraces those who happen to be in existence at the testator's death, without the necessity of inquiring into the previous history of the class, a bequest originally intended for the illegitimates may, by the birth, subsequently to the will, of legitimates, be diverted entirely to such after-born children (see *Godfrey v. Davis*, 6 Ves. 43; *Harris v. Lloyd*, T. & R. 310; *Gabb v. Prendergast*, 1 K. & J. 439). Thus, suppose A. to marry B. after she has had children of whom A. is reputed father; and after the marriage, but before the birth of legitimate offspring, to make a will bequeathing property to his children by B.; it can scarcely be doubted that the testator intends to provide for the illegitimates as well as any after-born legitimate children, but his intention would be defeated by the birth of a legitimate child, who would take all to the entire exclusion of the illegitimate. Where the general description of children in a will would include legitimate children, it is not extended so as to include illegitimates (*Bagley v. Mollard*, 1 R. & M. 581), unless there was, at the date of the will, an impossibility (and not a natural or physical, but a legal im-

Construction of gifts to illegitimate children.

Gifts to children as a class.

Description including legitimates, not extended to illegitimates.

Prec. XII.

—
for a reputed
son—if he
dies under

but if he shall die under the age of twenty-one years without leaving issue, the same legacy shall sink into the residue of

Gifts to illegitimate children.

possibility) of legitimate children coming into existence (*Lord Woodhouselee v. Dalrymple*, 2 Mer. 419). The rule is laid down in corresponding terms in *Pratt v. Mathew* (22 Be. 328), that a bastard cannot take under a gift to children, unless it is clear that legitimate children never could have taken under the gift. See also *Edmunds v. Fessey* (29 Be. 233); *Clifton v. Goodbun* (L. R., 6 Eq. 278), where the testatrix, describing herself as a spinster, bequeathed property in trust for all her "children;" *Re Wells' Estate* (L. R., 6 Eq. 599). The circumstance of the gift being to the children of the testator and a woman C., who is living with him in a state of concubinage, would formerly have been insufficient to entitle illegitimate children, because the testator might still have contemplated marriage with C., or if this were not contemplated, there was, at all events, the possibility of it; even the existence, at the date of the will, of a wife of the testator, was not sufficient to raise an obstacle to this supposed expectation of the birth of legitimate children by the woman in question (*Wilkinson v. Adam*, 1 V. & B. 462); but *qu.* now that the will would necessarily be revoked by a marriage, so that legitimate children never could have taken under the gift.

The union, in one gift to a class, of legitimate and illegitimate children does not invalidate the gift, although the legitimate and illegitimate members of the class have to be determined upon different principles (*Barnett v. Tugwell*, 31 Be. 232).

Where a testator made a bequest in favour of the daughters of A. (his first cousin once removed), and A. had died seven years before the date of the will leaving no legitimate, but two reputed daughters, of whom one was living at the date of the will, it was held that, to enable the surviving daughter to take under the bequest, it was not sufficient to show that there was at the date of the will no possibility of legitimate daughters, and that the lady in question was a reputed daughter, but that evidence must be given from which the testator's knowledge of those facts might be inferred (*Re Herbert's Trusts*, 1 J. & H. 121).

Bastard takes not as child of his father, but by virtue of being reputed such.

The intention to include an illegitimate child (*i. e.* a child *in esse*) in a bequest must be manifest on the face of the will (*Harris v. Lloyd*, T. & R. 310). A bastard cannot take by the description of child of his reputed father, until he has acquired the reputation of being such child (*Metham v. Duke of Devon*, 1 P. W. 529): he takes, not as a child by claim of kindred, but by virtue of his reputation that he is such child: being reputed the child of the testator, the words in the will serve the purpose of identification, and his reputation gives him a capacity to take under that name, merely as a description.

Bastards born at date of will.

Where the illegitimate children who are the intended objects of bounty have acquired names by reputation, they may be described by those names (see *Rivers's Case*, 1 Atk. 410), and the additional designation of them as

my personal estate; AND I DIRECT my trustees to invest the same legacy in their names in or upon any of the invest-

twenty-one
without leav-
ing issue, to

children, reputed children, or even as legitimate children, will not invalidate the gift, but be mere redundancy (*Standen v. Standen*, 2 Ves. j. 589). If the children have not acquired names by reputation, and are of such tender age that they have not acquired the reputation of being the children of their supposed father, it will be well to describe them as the children of the mother, or by the place where, or the persons with whom, they reside, or other such particulars.

Bastards born
at date of
will.

If the object of the gift be a child *en ventre sa mère*, it seems doubtful whether it can have acquired the reputation of being the child of the testator (*Metham v. Duke of Devon*, 1 P. W. 529; but see *Pratt v. Mathew*, 22 Be. 339), and it should be described as the child of the mother alone, as the child with which A. B. is now pregnant (*Gordon v. Gordon*, 1 Mer. 141), without making any reference to the supposed father, which would only introduce uncertainty into the description (*Earle v. Wilson*, 17 Ves. 528). And see *Holt v. Sindry* (L. R., 7 Eq. 170).

Bastard *en*
ventre sa
mère.

It is settled that a bequest cannot be made by a man to his future illegitimate children, for they can have acquired no title by repute; and a gift to the future illegitimate children of a woman is invalid, not by reason of any doubt as to identification, but on grounds of public policy (*Medworth v. Pope*, 27 Be. 71; *Howarth v. Mills*, L. R., 2 Eq. 389; *Holt v. Sindry*, L. R., 7 Eq. 170; *Re Connor*, 8 Ir. Eq. Rep. 401). The proper, and only certainly efficacious, mode of extending to bastard children unborn at the date of the will gifts contained in it, is by executing a codicil after the birth of each such child, expressly communicating to him or her the benefit of the disposition in the will; for the mere recognition in the codicil of the child as the testator's own, will not suffice to entitle such child to take under a gift in the will to children generally (*Arnold v. Preston*, 18 Ves. 288). Indeed, even a gift in the will itself to an illegitimate child, by the description of the child of the testator, will not enable such child to share in another bequest to children generally: but in *Worts v. Cubitt* (19 Be. 421), where there was a gift for the benefit "of A. my natural daughter and of all other my daughters," followed by a residuary bequest to "all my daughters," A. was held entitled to share in the residue. So, where a testator, who had one illegitimate nephew J., one legitimate nephew W., and no niece, gave a legacy to his "nephew J." and his residuary estate to the children of his "nephews and nieces," the children of J. participated in the residue (*Tugwell v. Scott*, 24 Be. 141). Where the son of A. (A. being a natural son of the testator) was described in a will as testator's "grandson," it was held that a daughter of A. was included in a gift to "grandchildren" (*Allen v. Webster*, 2 Gif. 177). And illegitimate children of an unmarried sister of the testator, described in the will by her maiden name, but who afterwards married, were held entitled to share in a legacy to her "and her two youngest daughters" (*Savage v. Robertson*, L. R., 7 Eq. 176). And see *Wilson v.*

Bastards to
be begotten
in futuro.

Description
of bastard as
a "child."

Prec. XII.

—
sink into re-
sidue.

ments or securities (and those only) hereinbefore authorized with respect to the said legacy of 500*l.*; AND I EMPOWER

Additional
cases on ille-
gitimacy.

Atkinson (4 N. R. 451) as to the effect, in a settlement, of a declaration that A., an illegitimate, should, for the purposes of the trusts, be deemed a lawful child.

In addition to the cases already cited, reference may be made to the following: *Mortimer v. West* (3 Rus. 370); *Cartwright v. Vandry* (5 Ves. 530); *Swaine v. Kennerley* (1 V. & B. 469); *Durrant v. Friend* (5 De G. & S. 343); *Re Overhill's Trust* (1 S. & G. 364); *Warner v. Warner* (15 Jur. 141); *Kelly v. Hammond* (26 Be. 36); *Mason v. Bateson* (26 Be. 404); all cases in which bastards were excluded from the benefit of bequests: and to the following, *Evans v. Davies* (7 Ha. 498); *Owen v. Bryant* (2 D. M. & G. 700); *Hartley v. Tribber* (16 Be. 510); *Evans v. Massey* (8 Pri. 22, a child *en ventre sa mère*); in which bastards were, on construction of the context, held entitled. See also 2 Jarm. Wills, ch. 31.

Illegitimacy,
with refer-
ence to the
legacy duty.

Although a child, described by a name or filial character which such child has acquired, will be entitled, whether legitimate or illegitimate, and it is therefore unnecessary for a testator to introduce the word "natural" or "reputed," yet there is one point of view in which the fact of the legitimacy or illegitimacy of the devisee or legatee designated as the testator's child may be important, namely, as it affects the rate of succession or legacy duty payable in respect of gifts to such an object, which duty, if the child be legitimate, would be one per cent. only, but if illegitimate, and consequently, in the eye of the law, a stranger in blood, would be ten per cent.

Bequests to
reputed
wives, or con-
cubines,

The principle above stated, that, where the illegitimate children are sufficiently identified as the intended recipients of a gift, the addition of a mis-description (such as a designation of them as children, or legitimate offspring) will not invalidate the gift, applies likewise to the mothers of such children: for, provided the testator's intention be clear as to the person to be benefited, and his description of her sufficient for identification, the additional designation of her as his "wife" will not prevent a woman not legally his wife from taking the gift intended for her. Thus, a bequest to "my dear wife Caroline" has been held to apply to a woman with whom the testator was then living, and with whom he had gone through the ceremony of marriage in the lifetime of his legal wife (*Doe v. Rouse*, 5 C. B. 422; *Dilley v. Matthews*, 2 N. R. 60; 11 W. R. 614). In *Pratt v. Mather* (22 Be. 339), the words "my wife" were held to be a *designatio personæ* of the lady with whom the testator was living, and with whom he had gone through the ceremony of marriage, but which marriage was void (under 5 & 6 Will. 4, c. 54), from the lady being the sister of testator's deceased wife. In *Smith v. Charles* (V.-C. *Kindersley*, December, 1864) a gift to "my wife A. during her life if she shall so long continue my widow but not otherwise," the marriage being void as within the prohibited degrees of consanguinity, was read as a gift to A. until marriage. In *Re Pitts* (27 Be. 576), where there was a bequest to "my

them, in their discretion, to vary the investment, from time to time, for any other of the kinds prescribed; AND I DIRECT them, during the minority of the said [*reputed son*], to apply the whole, or such part as they shall think fit, of the annual income yielded by the same legacy or the investment thereof, for his maintenance and education; and to accumulate the unapplied income by investing the same in manner aforesaid, and to dispose of the accumulations as part of the capital of the same legacy; AND I EMPOWER them during his minority to apply so much, not exceeding one half, as they shall think fit, of the capital of the same legacy, for his advancement in life, or otherwise for his benefit. I DIRECT my trustees to stand possessed of the said legacy of 2,000*l.*, money, UPON TRUST, with the consent in writing of my cousin [*name*], and after his decease in the discretion of my trustees, to invest the same legacy in their names in or upon any of the investments or securities hereinbefore authorized with respect to the said legacy of 500*l.*, but not in or upon any other investments or securities; AND I EMPOWER them, with such consent or in such discretion as aforesaid, to vary the investment, from time to time, for any other or others of the kinds prescribed; AND UPON FURTHER TRUST to permit the said [*cousin*] during his life to receive the annual income of the same legacy or the investment thereof; and after his decease, as to as well the capital of the same legacy or investment, as the annual income thereof thenceforth to accrue due, IN TRUST for the child if only one, or all the children if more than one, of the said [*cousin*], who, either before or after his decease, shall attain the age of twenty-one years or marry; and if more than one, equally; with power for

Trusts of another pecuniary legacy—for a cousin for life—for his children—maintenance and advancement.

wife," but upon the death of the testator it was discovered that the husband of his supposed wife was alive; as twenty years had elapsed since she left her legal husband, and before she went through the ceremony of marriage with the testator, and as she had apparently been guilty of no wilful misconduct, and there was not sufficient evidence to show that she did not believe herself *bonâ fide* a widow when she married the testator, Sir J. Romilly, M. R., held that the bequest was good. But a bequest to "my wife A.," who at the time of the marriage ceremony between her and the testator had to her knowledge a husband living, and had falsely represented herself to be a widow, was on the ground of the fraud committed by her, held void (*Wilkinson v. Joughin*, L. R., 2 Eq. 319); whilst a bequest by the same testator to "my step-daughter S.," an innocent legatee, was supported. See also *Turner v. Brittain* (3 N. R. 21).

Fraud, legacy void.

Prec. XII.

my trustees, after the decease of the said [*cousin*], to apply the whole, or such part as they shall think fit, of the annual income of the share of each child, while such share shall be contingent, for his or her maintenance and education, the unapplied income to be invested in manner aforesaid and accumulated, and the investment and accumulations to be applicable to the same purposes as the annual income of the same share, but, if not so applied, to be added to the capital thereof; And with power for my trustees, with the consent in writing of the said [*cousin*], and after his decease in their discretion, to apply so much, not exceeding one half, as they shall think fit, of the capital of the share of each child, while such share shall be contingent, for the advancement in life, or otherwise for the benefit of the same child; but if no child of the said [*cousin*] shall attain the age of twenty-one years or marry, then (subject to the powers aforesaid) the same legacy, with the accumulations, shall sink into the residue of my personal estate. I DIRECT my trustees to stand possessed of the said legacy of 3,000*l*. Consolidated Three per Cent. Annuities, IN TRUST for my niece [*name*], if she shall attain the age of twenty-one years or be married with the previous consent in writing of her guardian or guardians; but if she shall die under that age without having been married with such consent as aforesaid, the same legacy shall sink into the residue of my personal estate; AND I DIRECT my trustees to apply the dividends of the same legacy, during the minority and discoveriture of my said niece, for her maintenance and education, or at their option to pay the same to her guardian or guardians to be so applied, but for whose due application thereof my trustees shall not be responsible. I DIRECT my trustees to stand possessed of the said legacy of 4,000*l*. Reduced Three per Cent. Annuities, UPON TRUST, at any time or from time to time to apply the whole, or such part as my trustees shall think fit, of the capital or the income, or both, for the personal maintenance and support, or otherwise for the personal benefit (*q*) of

Trusts of a stock legacy,

—for a niece at twenty-one, or marriage with consent—in-
terim dividends to be applied for her maintenance.

Trusts of a stock legacy —for the personal maintenance of a nephew, to be applied at the discretion of trustees, or, at their option, disposed

As to restraints on alienation.

(*q*) The law of England does not allow the owner of property to bestow it on another deprived of its incidents. Of these incidents the right of alienation is one of the most important, and it has been guarded with a jealousy natural in a commercial country, whose obvious policy it is to promote the free circulation and interchange of property. Hence it has become an established doctrine, that where real or personal estate is given to a man during his life, or for any definite estate or interest of greater or

my nephew [*name*], or to pay the same, or such part thereof as they shall think fit, to any person or persons to be so applied, of as part of the residue.

less extent, accompanied with the strongest injunction against his aliening it, the prohibition is nugatory, and the devisee or legatee enjoys unfettered his disposing power. (See *Renaud v. Tourangeau*, L. R., 2 P. C. 4.) Upon a similar principle, and for reasons of policy still more obvious, the most positive and emphatic expression of a wish to devote the property to the personal and exclusive benefit of the devisee or legatee does not, in the event of his becoming bankrupt, prevent it from devolving to the assignees, in whom the law in such case has vested his general property (*Brandon v. Robinson*, 18 Ves. 429; *Graves v. Dolphin*, 1 Sim. 66; *Youngehusband v. Gisborne*, 1 Col. 400).

The mere ownership of income, however, though it cannot (except in one instance presently noticed, p. 200) be the subject of an inalienable trust, may be made to cease on alienation, bankruptcy, or other such event; see *Martin v. Margham*, 14 Sim. 230; *Rochford v. Hackman*, 9 Ha. 475; *Re Dickson's Trust*, 1 Sim., N. S. 37; *Jones v. Wyse*, 2 Ke. 285; *Montefiore v. Enthoven*, L. R., 5 Eq. 35; and it is in every day's practice to subject life interests, both in real and personal property, to determining provisions of this nature.

Income to
cease on
alienation.

But an estate of inheritance in lands, or the entire interest in personalty, cannot be made liable to divestment even on alienation or bankruptcy (*Ware v. Cann*, 10 B. & C. 433; *Bradley v. Peixoto*, 3 Ves. 324; *Whitfield v. Prickett*, 2 Ke. 608); for the power of alienation is incidental to an estate in fee or a complete ownership of personalty, and any attempted general restraint on the exercise of this incident to ownership is repugnant to the estate, and therefore void: see the notes to *Bradley v. Peixoto*, in Tud. L. C. R. P. 858. In *Churchill v. Marks* (1 Col. 441), however, this doctrine was held not to apply to a contingent reversionary interest in a personal fund; and in the course of that case (p. 445) it was suggested, that, under a devise to A. in fee, with a proviso that if A. aliene in B.'s lifetime the estate shall shift to B., the proviso would be valid—a position which certainly stands opposed to the views commonly entertained in the profession. In cases of this nature, the only mode of effectuating the design, often anxiously entertained by donors, of securing the *corpus* of the property against the acts of the donee himself and the claims of his creditors, is to invest a third person with a discretionary power either to give or withhold it, as he may think proper; in short, absolutely to defer all proprietary title in the intended object of bounty until its actual application to his use by the testator's nominee, and ultimately to give to another (for this seems to be essential to the consistency and effectiveness of the scheme) what remains so unapplied at his decease. Nor is this all; for, according to the doctrine of a recent case, in order to exclude the claim of the assignees in bankruptcy, the power should be made incapable of being exercised in favour of the bankrupt (supposing him to be the sole

To what extent alienation may be restrained.

Discretionary power of trustees, how affected by bankruptcy of object.

Prec. XII.

without liability on the part of my trustees to inquire into the application thereof; or, at the option of my trustees, to pay the

Restraint on alienation.

object of the power) after such event, or, in other words, the property should, on bankruptcy, be absolutely given over to another in like manner as at death; otherwise it is considered as a fraudulent attempt to continue the property in the bankrupt after the law has taken away his capacity to retain it, and consequently what remains unapplied belongs to the assignees (*Piercy v. Roberts*, 1 M. & K. 4. See also *Kearsley v. Woodcock*, 3 Ha. 185; *Wallace v. Anderson*, 16 Be. 533; *Sharp v. Cosserat*, 20 Be. 470; *Carr v. Living*, 28 Be. 644). Of course, there is no objection to the power, in the event of bankruptcy, being made exerciseable in favour of the wife or children of the bankrupt.

As to a power to alien in favour of defined objects.

The doctrine which prohibits the imposition of any general restraint on the alienation of the inheritance of lands, and the absolute property in personalty, has been held not to prevent the aliening power from being confined in its exercise to certain objects; as in the case of a gift to A. in fee, upon condition that in a certain event, he shall have no power to dispose of the property, unless to his sisters and their children; this was held to be valid (*Doe v. Pearson*, 6 Ea. 173); but see *Attwater v. Attwater* (18 Be. 336), by which *Doe v. Pearson* seems to be overruled. A restraint extending to particular modes of conveyance is not admissible, and a devisee in fee must be left at liberty to dispose of the property by any and every species of assurance which is adapted to the nature of his estate (*Ware v. Cann*, 10 B. & C. 433).

Alienation by a married woman may be restrained.

The single exception to the general doctrine respecting restraints on alienation is that in favour of married women, who may be prevented from disposing of annual income given for their separate use (to which the power of alienation is otherwise incident) by mere words of restriction, without any clause of forfeiture (*Miss Watson's Case*, cited 11 Ves. 221; *Jones v. Harris*, 9 Ves. 486). And even an estate in fee may be limited to the separate use of a married woman with a restriction on alienation (*Baggett v. Meux*, 1 Ph. 627); and see n. (b), *ante*, p. 143. But a woman not under coverture is incapable of being the object of an inalienable trust, no less than a person of the male sex, she not being exposed to marital influence, the exclusion of which has been the ground for placing in the hands of testators and settlors, in this solitary instance, the power of creating such a trust, by way of compensation, it would seem, for those disabilities which the policy of the law has annexed to a state of coverture (*Woodmeston v. Walker*, 2 R. & M. 197. See also *Barton v. Briscoe*, Jac. 603; *Jones v. Salter*, 2 R. & M. 208; *Brown v. Pocock*, Id. 210). The cited cases show that the circumstance of the cestui que trust being under coverture when the will takes effect, is no further material, than that it renders the restriction immediately operative; for discovery, come when it may, *i.e.*, whether it exists at, or occurs subsequently to, the creation of the interest in question, necessarily brings with it exemption from the clog. (See *Wright v. Wright*, 2 J. & H. 647.) By parity of reasoning, in the con-

Doctrine not applicable to unmarried women.

Separate use, future coverture.

whole, or such part as they shall think fit, of the capital or the income or both to my executors or administrators, to be disposed

verse case, namely, where the cestui que trust is discovert at the death of the testator, and afterwards marries, the futurity of the latter event cannot detract from the force of the restriction, which will be exactly co-extensive with the coverture whenever contracted; and if the cestui que trust does not avail herself of the privilege of alienation resulting from her temporary discoverture, the restriction will adhere to her during any subsequent coverture as firmly as if she had been married at the testator's decease. See the elaborate judgments of Lord *Langdale* and Lord *Cottenham* in *Tullett v. Armstrong* (1 Ke. 428, 1 Be. 1, 4 M. & C. 377. See also Sweet's Cases on Separate Estate, 28; 1 Hayes, Conv. 499).

Tullett v. Armstrong.

Where the trust was to pay the rents, &c. to such person or persons as a married woman should, by writing under her hand from time to time, but not by way of anticipation, appoint; and in default of such appointment, or so far as the same should not extend, into her proper hands, for her sole and separate use, with a direction that her receipts, notwithstanding coverture, should be good discharges; and, after her death, in trust for her children; Sir *L. Shadwell*, V.-C. E., held (*Brown v. Bamford*, 11 Sim. 127), that, as the restriction on anticipation was not repeated in the trust for the separate use of the cestui que trust, she took a life interest under that trust, exempt from any restraint on her aliening power; but this decision was reversed by Lord *Lyndhurst* (1 Ph. 620). And the principle of his Lordship's construction has been followed in subsequent cases (*Harrop v. Howard*, 3 Ha. 624; *Harnett v. Macdougall*, 8 Be. 187; *Field v. Evans*, 15 Sim. 375; *Re Ross's Trust*, 1 Sim., N. S. 196; *Baker v. Bradley*, 2 S. & G. 531).

Brown v. Bamford.

As to an attempted assignment by a married woman restrained from anticipation of an apportioned part of current interest up to the date of the assignment, see *Re Brettle* (2 D. J. & S. 79).

When once the restraint of anticipation is imposed, and by reason of coverture has become effectual, it is only by the determination of the coverture that the restraint can be removed. Thus, where a testator gave a legacy to a married woman upon condition that she conveyed within twelve months an estate devised to her by another testator for her separate use with a clause against anticipation, it was held that the Court had no power to interfere for the purpose of enabling the married woman to comply with the request (*Robinson v. Wheelwright*, 6 D. M. & G. 535). So, also, a wife's property, settled by herself on her marriage to her separate use without power of anticipation, is not applicable, during the coverture, to make good loss occasioned by her own breach of trust; *secus*, as to property settled to her separate use, without restraint on anticipation (*Clive v. Carew*, 1 J. & H. 199; *Pemberton v. M^cGill*, 1 Dr. & S. 266). And where the fund has been settled by order of the Court to the separate use of a married woman without power of anticipation, the Court will not dis-

Restraint on anticipation cannot be dispensed with by the Court.

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Trusts of another stock legacy—for the children of a sister, postponing the distribution, in order to let in all the children—maintenance and advancement.

of as part of the residue of my personal estate; to the intent that my trustees may be enabled to adapt the disposition of the fund to the circumstances for the time being of my said nephew, and thereby to secure, so far as possible, his personal enjoyment thereof, and prevent the same from becoming the property of his alienees or creditors; with power for my trustees to invest in their names so much of the fund as shall from time to time remain unapplied in the public funds, or on Government securities of the United Kingdom (but not in other investments or securities), and to vary the investments at their discretion for any other or others of such funds or securities, and to accumulate the same by repeated investments of the dividends, but so that the accumulation shall not be carried beyond the period of twenty-one years from my decease; AND I DECLARE that so much of the capital, income and accumulations as shall remain in the hands of my trustees at the death of my said nephew shall fall into the residue of my personal estate. I DIRECT my trustees to stand possessed of the said legacy of 5,000*l.* New Three per Cent. Annuities, IN TRUST for the children of my sister [*name*], who, either before or after her decease, shall attain the age of twenty-one years or marry, in equal shares, but the distribution of the capital to be postponed till my said sister shall die or attain the age of [*fifty*] years [*or, till my said sister shall die, or, till she shall have attained the age of [*fifty*] years, and my trustees shall, in writing under their hands, declare that there has ceased to be any probability (r) of*

Married woman.

turb it (*Chapman v. Lamport*, 8 W. R. 466). But in *Fleming v. Armstrong* (34 Be. 109), a suit for partition of real estate, one share of which was settled to the separate use of a married woman without power of anticipation, the Court declared the costs of the suit of herself and husband to be a charge on her share, and ordered them to be raised by a sale.

Separate estate.

See also on the doctrine of the wife's separate estate, the notes to *Hulme v. Tenant*, in 1 Wh. & Tud. L. C. Eq. 435; and on the liability of her separate estate to answer her general engagements, see *Johnson v. Gallagher* (3 D. F. & J. 494); *Shattock v. Shattock* (L. R., 2 Eq. 182); *Mrs. Mattherman's Case* (L. R., 3 Eq. 781); *Butler v. Cumpston* (L. R., 7 Eq. 16).

Possibility of issue down to death.

(*r*) Though the legal possibility of issue continues down to the last moment of life, without distinction of sex (*Jee v. Audley*, 1 Cox, 324; and see *Re Sayer's Trusts*, L. R., 6 Eq. 319), yet Courts of Equity will liberate a fund, when, from the advanced age of a female, the probability of the birth of children is at an end (*Leng v. Hodges*, Jac. 585; *Fraser v.*

the birth of a future child or children of my said sister], in order that no child attaining the said age or marrying may, in the ordinary course of nature, be excluded (s); AND I DIRECT my

Fraser, ib. 586, n.; *Lyddon v. Ellison*, 19 Be. 565; *Edwards v. Tuck*, 23 Be. 268). In *Fraser v. Fraser*, and *Lyddon v. Ellison*, the respective ages of the ladies (both unmarried) in question were 55 and 56; in the other cases the age seems to have been considerably greater. The Courts will liberate the fund without, as formerly, requiring the applicants to give security to refund if necessary, and sometimes even without requiring them to enter into recognizances so to do; the order for payment has been made on the mere undertaking of the parties to account for the fund (*Brown v. Pringle*, 4 Ha. 124; and see *Miles v. Knight*, 12 Jur. 666; *Dodd v. Wake*, 5 De G. & S. 226). But in both the before-cited cases of minimum age (*Fraser v. Fraser*, *Lyddon v. Ellison*, *ubi sup.*), the personal recognizances of the parties were required. The Court will not treat as past child-bearing a woman under 50, although positive medical evidence that she is past child-bearing be adduced (*Groves v. Groves*, 12 W. R. 45).

Equitable relief, in case of woman of advanced age.

As to the uncertainty of the age at which the power of child-bearing ceases, see Taylor, Med. Jurisp. ch. 55; and see Dart, V. & P. 232, 233, where the author states on respectable medical authority that the peculiar effect of the Australian climate on the English constitution is often to induce pregnancy in female emigrants who have passed the usual period of child-bearing in England.

(s) The rules for ascertaining the objects of gifts to children as a class, so far as relates to the period of their coming into existence, are as follows: *First*, If no period of distribution is named, the class is ascertained at the death of the testator; and a gift which takes effect in possession immediately on the testator's decease in favour of the "children" of A., whether A. be living or dead, extends to children in existence at the death of the testator, if there are any such, and those only (*Hill v. Chapman*, 3 Br. C. 391; *Viner v. Francis*, 2 Cox, 190). *Secondly*, When a period of distribution is named, *that* is the time for ascertaining the class (*Hagger v. Payne*, 23 Be. 478). *Thirdly*, A gift to children, the distribution of whose shares is postponed until majority or some other age (which none of the class at the testator's decease has attained), embraces the children living at the testator's decease, and also those who come *in esse* before the eldest attains the prescribed age, when the distribution *pro tanto* (i. e. to such eldest child) takes place, and children born after that time are excluded (*Gilbert v. Boorman*, 11 Ves. 238; *Robley v. Ridings*, 11 Jur. 813; *Hodson v. Micklethwaite*, 2 Drew. 296; *Bateman v. Foster*, 1 Col. 118; *Gillman v. Daunt*, 3 K. & J. 48; and see *Bateman v. Gray*, L. R., 6 Eq. 215). *Fourthly*, A gift to children preceded by a life interest, includes the children living at the death of the testator, and those who come *in esse* in the lifetime of the prior devisee or legatee, whose death is made the

Gifts to children as a class;

—as to the period of the children coming into existence.

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trustees to apply the income of the contingent share of each child, whether liable to reduction by an increase in the number

Gifts to children as a class.

period of distribution (*Devisme v. Mello*, 1 Br. C. 537; *Leigh v. Leigh*, 17 Be. 605; *Crone v. Odell*, 3 Dow, 61); and such is the rule whenever the distribution is postponed to a future period (*Gardner v. James*, 6 Be. 170). *Fifthly*, Where no child is in existence at the testator's decease, the devise or bequest, though framed as a gift in possession, will extend to all the children who afterwards come *in esse* (*Weld v. Bradbury*, 2 Ver. 705; *Harris v. Lloyd*, T. & R. 310). And a gift which appears on the face of the will as a future disposition in favour of children, but is reduced, by events happening in the testator's lifetime, to a gift in possession, of course falls within this rule (*Haughton v. Harrison*, 2 Atk. 329). And there is some ground to contend that the same doctrine applies where the gift in favour of children is preceded by a life interest, which determines before any child is born (*Chapman v. Blissett*, Ca. t. Talb. 145; *Hutcheson v. Jones*, 2 Mad. 124; *Horseman v. Abbey*, 1 J. & W. 381. See also *Lord Beaulieu v. Lord Cardigan*, Amb. 533; *Wyndham v. Wyndham*, 3 Br. C. 58; but see *Bartleman v. Murchison*, 2 R. & M. 136); except where the gift to the children is a contingent remainder, in which case, by the well-known rule governing that species of interest, the remainder must take effect, if at all, at the instant of the determination of the particular estate.

As to letting in children born after determination of prior life interest.

It will be perceived, that the point as to the letting in of children born after the determination of the preceding life interest can only arise where the tenant or legatee for life is some person other than the parent of the children; for, where the ulterior gift is to the children of such devisee or legatee for life, no child can come *in esse* after the determination of the prior interest (a child *en ventre* being considered as *in esse*); so that, if the interests of the children are made to vest immediately on the decease of the legatee for life, there can be no exclusion: where, however, this is not the case, but the gift is so framed that some children may, and others may not, at the time of the determination of the prior interest, answer the testator's description, it should seem that, in the event of there being children of each sort at the period in question, the gift would take effect in favour of actual objects, in exclusion of presumptive objects, *i. e.* it would let in persons then completely answering the description, to the exclusion of those who might afterwards answer it. Such is, beyond all question, the rule where the ulterior estate is a legal contingent remainder, and in regard to all other interests, it was stated in the earlier editions of this work that there was strong ground to contend that a similar rule applied. If such had been the fact, it produced this important practical result—that, under the ordinary trust for A. for life, and at his decease for his children who shall attain twenty-one or marry, if A., at the time of his decease, has two children, one of whom has attained his majority or is married, and the other is then a minor and unmarried, the former becomes

of objects or not, for his or her maintenance and education, or, at the option of my trustees, to pay the same income to my said

solely entitled in exclusion of the child, who, subsequently to the decease of A., attains majority, or marries during minority—a result which, it is needless to say, is contrary to the intention. The editor, however, has had before him an opinion of the late Mr. Jarman, the writer of this note, in which the point here dealt with was brought to his notice as a referee upon a disputed title questioned on this ground. Mr. Jarman stated that he had altered his opinion, and he advised, in effect, that where there is a gift (the subject-matter not being a legal estate of inheritance in freeholds) to A. for a particular interest, with a gift over to a class not finally ascertainable at the determination of A.'s interest, the gift over embraces all who eventually become members of the class, notwithstanding the existence of objects completely answering the testator's description at the determination of A.'s interest: in other words, that the doctrine of tenure which governs legal contingent remainders of freeholds of inheritance does not apply. See *Hopkins v. Hopkins* (Ca. t. Talb. 44, 1 Atk. 581); *Chapman v. Blissett* (Ca. t. Talb. 145). It is important, therefore, in order that the questions above referred to may be avoided, that every trust of personalty or of realty not being a legal estate in freeholds should contain words indicating that children attaining majority or marrying subsequently to the decease of the cestui que trust for life, or rather subsequently to the arrival of the period of distribution in regard to any other object, are to be included.

Subject of gift not legal freeholds of inheritance.

With respect to freeholds of inheritance, it was suggested in the last edition of this work that if the legal estate in such freeholds were devised to A. for life, and after his death to his children, who, either before or after his death shall attain twenty-one, or to the children of B., born either before or after the death of A., children attaining majority or born after A.'s death would take by executory devise. But this view, notwithstanding the support derived from *Doe v. Hopkinson* (5 Q. B. 223) and *Browne v. Browne* (3 S. & G. 568), appears to the present writer untenable. When a devise is capable, according to the state of the objects at the death of the testator, of taking effect as a remainder, it is not construed as an executory devise: to constitute the ulterior limitation an executory devise, the precedent estate must necessarily be determinable before the ulterior devise takes effect; if it be merely liable to determine before the ulterior devise takes effect, the liability only renders the remainder contingent. Thus to A. for life, and after his death to the (unborn) children of B.; this (if A. survive the testator) is a contingent remainder, because as A. may live until B. has a child there is not necessarily any interval between the two estates. Again, to A. for life, and after his death to the children of A. who shall attain twenty-one; a contingent remainder, since children of A. may attain twenty-one in the lifetime of A. And if the devise be to A. for life, and after his death to the children of A. who either before or after his death shall attain twenty-one—*non constat* that any child will attain twenty-one after the death of A., all may attain twenty-

Freeholds of inheritance—executory devise, or contingent remainder.

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Advance-
ment.

sister, to be so applied by her, but without liability to account ;
AND I EMPOWER my trustees to apply so much, not exceeding

Devise to A.
for life, and
then to the
children of A.
who shall at-
tain twenty-
one.

one in the lifetime of A., there is not necessarily any interval between the two estates ; and the devise to the children of A. is therefore a contingent remainder (though it would be an executory devise if A. predeceased the testator and left only infant children). Can any distinction be maintained between a devise to A. for life and after his death to "the children of A. who either before or after his death shall attain twenty-one," and a devise to A. for life and after his death to "*all and every* the children of A. who shall attain twenty-one"? But the latter is a contingent remainder (*Festing v. Allen*, 12 M. & W. 279 ; *Rhodes v. Whitehead*, 2 Dr. & S. 532 ; and see *Holmes v. Prescott*, 3 N. R. 559, 12 W. R. 636 ; *Price v. Hall*, L. R., 5 Eq. 399), and fails if no child has attained twenty-one at the death of A., or becomes vested in those children who have then attained twenty-one to the exclusion of those who afterwards attain that age (*Mogg v. Mogg*, 1 Mer. 654). There are two classes of cases, (1) where the devise is to a person at a given age, with a gift over if he dies under that age ; where there is an absolute gift to some ascertained person, accompanied by words which though apparently importing a contingency do in reality only indicate certain circumstances on the happening or not happening of which the estate previously vested is to be divested ; of this class are *Edwards v. Hammond*, 1 Lev. 132, *Brownfield v. Crowder*, 1 B. & P., N. R. 313, *Doe v. Moore*, 14 Ea. 601, *Doe v. Nowell*, 1 M. & S. 327, 5 Dow, 202 ; (2) where the given age is part of the description of the devisee, and there is no gift to any person who does not answer the whole of the description ; see *Duffield v. Duffield*, 1 D. & Cl. 268, *Nenman v. Newman*, 10 Sim. 51, *Bull v. Pritchard*, 5 Ha. 567, *Stead v. Platt*, 18 Be. 50. In a devise to "the children of A. who shall attain twenty-one," the attaining twenty-one is as much part of the description as being a child of A., and if the attaining twenty-one constitutes part of the description of the objects, nothing vests in any child until twenty-one ; and it would seem that the result is not varied by the presence of a maintenance clause (*Bull v. Pritchard*, 5 Ha. 567). The addition of the words "either before or after the death of A." shows unmistakeably the testator's intention ; but we have not here to deal with the intention, but with the result of a rule of law (see *Rhodes v. Whitehead*, 2 Dr. & S. 532), which, unlike a rule of construction, is inflexible. The simple way to give effect to the intention is, to devise the legal fee to trustees, giving the children of A. only an equitable estate, on which ground the decision of *Riley v. Garnett* (3 De G. & S. 629) is to be supported ; or there may be interposed between the life estate of A. and the estate of his children a limitation to trustees for a term of twenty-one years from the death of A. if any child of A. shall so long be living and under twenty-one (making due provision for the application of the rents during the term).

Effect of ex-

In construing words expressly restricting or enlarging the class of chil-

one-half, as they shall think fit, of the capital of the share of each child, whether vested or contingent, and whether liable to

dren who are the objects of the gift, there seems in general to be no material extension of the range of objects by the introduction of the word "all" (*Scott v. Harwood*, 5 Mad. 332). It is also clear that the words "hereafter to be begotten," added to a future gift to children (*i. e.* a gift under which the possession or distribution is postponed to a period subsequent to the death of the testator) have no effect in extending the class to objects born after the period of distribution (*Paul v. Compton*, 8 Ves. 375; *Whitbread v. Lord St. John*, 10 Ves. 152; *Gilbert v. Boorman*, 11 Ves. 238). Nor, on the other hand, do these words exclude existing children (*Hebblethwaite v. Cartwright*, Ca. t. Talb. 30; *Almack v. Horn*, 1 H. & M. 630); though a bequest in a codicil to "each child that may be born" to A. was held to apply only to children born after the date of the codicil (*Early v. Middleton*, 14 Be. 453; *Townsend v. Early*, 28 Be. 429; 3 D. F. & J. 1). But if the gift be immediate, *i. e.* to take effect in possession on the death of the testator, such words as "to be born" or "to be begotten," annexed to a general devise or bequest to children, have the effect of extending it to all the children who shall ever come into existence (*Mogg v. Mogg*, 1 Mer. 654; see also *Gooch v. Gooch*, 14 Be. 565, 3 D. M. & G. 366). But this construction does not apply to pecuniary legacies, where the consequence of letting in children born after testator's death would be, the postponement of the distribution of the testator's general estate, until the death of the parent of the legatees (*Storrs v. Benbow*, 2 M. & K. 46, 3 D. M. & G. 390; *Butler v. Lowe*, 10 Sim. 317; *Mann v. Thompson*, Kay, 638; *Ringrose v. Bramham*, 2 Cox, 384; see, however, *Defflis v. Goldschmidt*, 1 Mer. 417): in such cases the words of futurity are held to refer to the interval between the date of the will and the death of the testator.

pressions to extend or restrict the class.

Pecuniary legacies.

It should seem that if the event, on the occurrence of which the persons constituting the class of children entitled are to be ascertained, happens in the lifetime of the testator, as in the case of a bequest to the children of A., who shall be living at the death of B., as tenants in common, and B. dies in the lifetime of the testator, the gift extends to the children of A., and those only, who are living at the death of B. (see *Allen v. Callow*, 3 Ves. 292; *Harvey v. Harvey*, 3 Jur. 949); but such a gift is still a gift to a class (*Lee v. Pain*, 4 Ha. 250), and if any child living at the death of B. afterwards dies in the testator's lifetime, the share of such child does not lapse, but the surviving children take the whole (*Lee v. Pain*, *ubi sup.*; *Leigh v. Leigh*, 17 Be. 605; *Cruse v. Howell*, 4 Drew. 215).

Effect of events happening in testator's life.

If the gift be to the "children of A., to wit, B., C. and D.," it is considered to be made to the children, not as a class, but as individuals (*Bain v. Lescher*, 11 Sim. 397), and consequently the share of one who died in the testator's lifetime was held to be undisposed of. But if a testator, after bequeathing to children as a class, revokes the bequest as to one of

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Trusts of stock standing in testator's name for four nieces and their children, with cross-limitations, and a direction to settle the income to their separate use.

reduction by an increase in the number of objects or not, for his or her advancement in life, or otherwise for his or her benefit ; AND I DIRECT the income of the share of each child whose share shall be vested, or of so much thereof as shall not be applied as last aforesaid, to be paid to such child during the postponement of the distribution. I DIRECT my trustees to stand possessed of the said legacy of 6,000*l.* Consolidated Three per Cent. Annuities, UPON TRUST to divide the same into four equal shares, and to settle the yearly produce of one of such shares on each of my four nieces [*names*], in such manner as the counsel of my trustees shall advise and approve as most effectual for securing to her the personal receipt and enjoyment thereof during her life, inalienably and independently of any husband (the costs of such settlement to be defrayed out of the said yearly produce) ; and after her decease, as to her share and the yearly produce thenceforth to accrue due for the same, IN TRUST for her children equally or her child (as the case may be), who, either

them, B., the entire subject of gift devolves to the rest (*Shaw v. M'Mahon*, 4 Dr. & War. 431). A gift to "all my grandchildren with the exception of one, viz. : ———," was held to be a gift to the class not affected by the incomplete exception (*Ullingworth v. Cooke*, 9 Ha. 37).

In ascertaining the persons to take under a gift to children as a class after the determination of a previous life estate, the Court adopts the rule of including as many objects of the gift as possible, consistently with the declared purpose of the testator (*Bouverie v. Bouverie*, 2 Ph. 351 ; *Jackson v. Dover*, 2 H. & M. 209).

As to the claims of a child *en ventre sa mère*.

It may be observed, that a child *en ventre sa mère* is regarded as a child *in esse* ; and this construction obtains as well where the gift is to children generally, as where it is to children "living" at a prescribed period (*Clarke v. Blake*, 2 Ves. j. 673), or even to children "born" at such period (*Rawlins v. Rawlins*, 2 Cox, 425 ; *Whitelock v. Heddon*, 1 B. & P. 243 ; *Trower v. Butts*, 1 S. & S. 181), the word being evidently used in a general popular sense, without the particular design of distinguishing between children born and children procreated. The mention of these objects, therefore, is quite superfluous, unless it be for the purpose of excluding them, an intention scarcely supposable. But a child *en ventre* is treated as "living" or "born" only where such construction is necessary for the benefit of that child, *e. g.*, when the words are used in the description of the objects of a bequest, not when used merely for the purpose of ascertaining a period of time (*Blasson v. Blasson*, 2 D. J. & S. 665).

See further on devises or bequests to children as a class, the notes to *Viner v. Francis*, in Tud. L. C. R. P. 702, *et seq.* ; and 2 Jarm. Wills, ch. 30.

before or after her decease, shall, being a son or sons, attain the age of twenty-one years, or, being a daughter or daughters, attain that age or be married; and if any of my four last-mentioned nieces shall not have any child, who shall, being a son, attain the age of twenty-one years, or, being a daughter, attain that age or be married, then, as to as well the share or shares originally limited to the niece or nieces not having any such child as last aforesaid, as the share or shares limited to such niece or nieces by this cross executory limitation, IN TRUST for the others, in equal shares, or the other of my said four nieces, for their or her respective lives or life, and after their or her respective deaths or death, for their or her respective children or child, in manner hereinbefore expressed respecting her or their original share or respective shares; but if none of my said four nieces shall have any child who, being a son, shall attain the age of twenty-one years, or, being a daughter, shall attain that age or be married, then the whole fund shall sink into the residue of my personal estate. I DIRECT the sum of £—— to be invested, within three calendar months after my decease, in the purchase, in the names of my trustees, of an annuity from the Government commissioners, to be payable during the life of my nephew [*name*], and to be held by my trustees, UPON TRUST, in their discretion, and of their uncontrolled authority, to manage and administer the said annuity, and to pay and apply the whole or such portion only of the said annuity as they shall think expedient, to or for the clothing, board, lodging, maintenance and support, or otherwise for the personal and peculiar benefit of my said nephew, during his life, (whether infant or adult, and whether competent or incompetent to give an acquittance or discharge,) at such time or times, in such proportions, and in such manner in all respects, as my trustees shall think most conducive to his comfort and convenience; AND I DECLARE that if my said nephew shall die before the investment of the said sum by my trustees in the purchase of an annuity as aforesaid, or if at his decease any portion of the annuity shall remain in the hands of my trustees unapplied to the purposes of the trust last aforesaid, then the uninvested or unapplied money shall sink into the residue of my personal estate. I BEQUEATH the annuities following, (namely): To [*name*] an

Direction to purchase a Government annuity to be applied at the discretion of trustees, as a personal provision.

Bequest of annuities; —to one for life;

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—to two and the survivor;

—to one for two joint lives;

—to trustees, for life of a nephew, in trust for him till alienation, &c., and then for his wife and children;

—for the life of a married niece, for her separate use, inalienably.

Direction as to payment of annuities;

—funds to be set apart for answering annuities.

annuity of £—— for his life; To [name] and [name], his wife, and the survivor of them, for their lives and the life of the survivor, an annuity of £——; To [name] an annuity of £—— for the joint-lives of himself and his father [name]; To my trustees an annuity of £——, for the life of my nephew [name], UPON TRUST to pay the same annuity to my last-mentioned nephew, until he shall do, commit or permit some act or default, whether voluntary or involuntary, which, if the trust for payment to him of the same annuity were to continue, would be inconsistent with his personal enjoyment of the whole benefit of such trust; and thenceforth to apply the same annuity for the maintenance, or otherwise for the benefit of his wife and children for the time being, or any of those objects, in such manner as my trustees shall in their discretion think fit, so long as there shall be any such object in existence, and, after such act or default and failure of such objects as aforesaid, the same annuity shall cease; To my trustees an annuity of £——, for the life of [name], the wife of [name], IN TRUST for her, but so that during her present coverture my trustees shall pay the same as the portions thereof shall accrue due, and not by way of anticipation, into her proper hands, and for her sole use, free from marital control; for which payments her receipts shall be discharges to my trustees. I DIRECT that the annuities aforesaid shall be paid in equal portions half-yearly on the 5th day of January and 5th day of July in every year, the first portion to be paid on such of the said days as shall first happen after my decease (*t*); and that a proportion of such annuities respectively, down to and inclusive of the days of the deaths of the respective annuitants, shall be paid immediately after their respective deaths: AND I DIRECT my executors to appropriate or purchase in their names, within six calendar months after my decease, funds in the Consolidated Three per Cent. Annuities, and the Reduced Three per Cent. Annuities, or both, (but not in or upon any other investment or security), sufficient at the period of appropriation to answer, by means of the divi-

(*t*) Where, as in this instance, the investment for securing an annuity is to be made in a particular stock, it is convenient that the annuity should be payable on the same days as the dividends on such stock.

dends thereof, the payment of the said annuities respectively, (which funds, on the death of the respective annuitants, shall fall into the residue of my personal estate), and in the meantime, until such appropriation, to pay the said annuities out of my general personal estate. I DIRECT my executors to pay the legacy duty and incidental expenses chargeable on the specific, pecuniary and stock legacies and the annuities aforesaid, so that the legatees and annuitants may receive the full amount thereof (u). As to the residue of my personal estate, (including the said sum of £——, with which my residuary freehold and leasehold estates are hereinbefore charged), I BEQUEATH the same to my trustees upon the trusts following, (namely): As to one equal third part of the said residue, UPON TRUST, with

Direction to executors to pay legacy duty.

Bequest of residue to trustees.

As to one-third—to invest—income

(u) As the Act of 36 Geo. 3, c. 52, has not subjected to legacy duty money which is to be appropriated in payment of the duty on legacies, a saving is effected by directing the duty to be paid out of the general estate. In the case of annuities, it is often advisable to relieve the legatee from the burthen, which being payable out of his income (by four equal annual instalments) is much felt. This observation, however, is not applicable to annuities which are directed to be purchased (*ut ante*, Prec. V. p. 124); in which case the Act of 36 Geo. 3, c. 52, makes the duty attach on the price of the annuity as a pecuniary legacy.

Suggestion as to legacy duty.

The following expressions exempt legatees from legacy duty. A direction to pay all legacies "without any deduction" (*Barksdale v. Gilliat*, 1 Sw. 562); to pay annuities and legacies, "clear of property tax and all expenses whatsoever attending the same" (*Courtois v. Vincent*, T. & R. 433); "free from all expense" (*Gosden v. Dotterill*, 1 M. & K. 56); "clear of all taxes and outgoings" (*Louch v. Peters*, *ib.* 489); "free from any charge or liability in respect thereof" (*Warbrick v. Varley*, 30 Be. 241); and generally, a gift of a "clear" annuity of definite amount, involves an exemption from duty (*Haynes v. Haynes*, 3 D. M. & G. 590; *Wilks v. Groom*, 4 W. R. 697): but a direction to invest sufficient stock to produce a clear yearly income does not (*Banks v. Braithwaite*, 10 W. R. 612). As to the duty on the proceeds of real estate devised upon trust for sale, see *White v. Lake* (L. R., 6 Eq. 188). And see *Floyer v. Bankes* (3 N. R. 16, 12 W. R. 28), as to exemption from succession duty of a jointure rent-charge "without any deduction in respect of any taxes."

Exemption from legacy duty.

Succession duty.

A direction in a will that the duty on legacies "herein" given shall be paid out of the testator's estate, will not exempt legacies given by codicil (*Early v. Benbow*, 2 Col. 355; but see *Jauncey v. Attorney-General*, 3 Gif. 308); otherwise, when legacies generally are given duty free (*Byne v. Currey*, 2 Cr. & M. 603). See also *Chatteris v. Young* (2 Rus. 183); *Cooper v. Day* (3 Mer. 154).

Prec. XII.

—
to a brother
for life—his
wife for life
—capital to
their children
—mainte-
nance and ad-
vancement.

Maintenance.

Accumula-
tion.Advance-
ment.

As to another
third—simi-
lar trusts (by
reference) for
another bro-
ther and his
family.

the consent in writing of my elder brother [*name*], and [*name*], his wife, or the survivor of them, and after the decease of such survivor in the discretion of my trustees, to invest the same third part in their names in the public funds, or on Government securities of the United Kingdom, or on real securities in England or Wales, but not elsewhere, and not in any other investment or security, and to change the investment from time to time for any other or others of the kind prescribed (*x*); AND UPON FURTHER TRUST to empower the said [*elder brother*] during his life, and after his decease the said [*wife*], his wife, during her life, to receive the annual income of the same third part; and after the decease of the survivor of them, as to as well the capital of the same third part as the annual income thereof thenceforth to accrue due, IN TRUST for the child if only one, or all the children if more than one, of the said [*elder brother*], who, either before or after the determination of the previous trusts shall attain the age of twenty-one years or marry, and, if more than one, equally; with power for my trustees, after the decease of the survivor of the said [*brother*] and [*wife*], his wife, to apply the whole or part of the annual income of the share of each child, while such share shall be contingent, for his or her maintenance and education, accumulating the unapplied income, by investing the same in manner aforesaid, and disposing of the accumulations as part of the same share; and also with the consent in writing of the said [*brother*] and [*wife*], or the survivor, and after the decease of the survivor in the discretion of my trustees, to apply so much, not exceeding one half, as my trustees shall think fit, of the share of each child, whether vested or contingent, for his or her advancement in life, or otherwise for his or her benefit; AND as to one other third part of the said residue, UPON SUCH TRUSTS and with such powers in favour of my younger brother [*name*] and [*name*], his wife, and his child or children, as shall correspond with the preceding trusts and powers in favour of the said

(*x*) In framing precedents of wills, it is generally desirable that each disposition should be complete in itself; but where several dispositions occur, which require the same provision, as a provision for investing and varying the investment, a general clause (see *post*, p. 214) may be applied with advantage to the whole.

Prec. XII.

[*elder brother*] and [*wife*], and his child or children; AND as to one equal moiety of the remaining third part of the said residue, UPON TRUST to permit my sister [*name*], the wife of [*name*], to enjoy the annual income thereof for her life, but so that during her coverture my trustees shall pay such income as the same shall become due, and not by way of anticipation, into her proper hands and for her sole use, free from marital control, for which payments her receipts shall be discharges to my trustees; And after her death, UPON TRUST to pay the annual income thereof to her said husband, for his life; and, subject to the trusts aforesaid, as to as well the capital of the same moiety as the annual income thereof thenceforth to become due, UPON SUCH TRUSTS and with such powers in favour of the child and children of my same sister, as shall correspond with the trusts and powers hereinbefore declared in favour of the child and children of my said elder brother [*name*]; AND as to the other equal moiety of the same third part, UPON SUCH TRUSTS and with such powers in favour of my sister [*name*], the wife of [*name*], and her said husband, and her child or children, as shall correspond with the trusts and powers hereinbefore partly declared and partly referred to concerning the first-mentioned moiety of the same third part: I DIRECT that each of my said sisters shall have power by will to appoint all or any part of the income of her said moiety to be paid to any after-taken husband who shall survive her, for his life: I FURTHER DIRECT that, on failure of the trusts of either moiety of the same third part, such moiety shall be subject to the trusts and powers affecting the other moiety (*y*): I FURTHER DIRECT that on failure of the trusts of any of the said third parts, the part or parts whereof the trusts shall so fail, with all accretions thereto under this clause, shall be added to the other, or to the others equally [*or, if the division be unequal*, rateably or apportionably according to the original division], of the said third parts, and be subject to the trusts and powers hereinbefore declared or referred to concerning the part or respective parts to which

As to one moiety of the remaining one-third— income to a sister for her separate use for life—to husband for life— capital to her children (by reference).

As to the other moiety of the same third—similar trusts (by reference) for another sister and her family.

Cross-limitations between the two sisters and their families of their respective moieties of a third.

Cross-limitations between the brothers and sisters and their families of their respective thirds.

(*y*) See *Atkinson v. Jones* (Joh. 250, 254), where *Wood*, V.-C., expressed an opinion that a similar trust by way of cross-limitation was in an unusual shape. The Precedent in the text appeared in the previous editions of this work. A similar form will be found in *Sweet's Conc. Prec.* 395, 5 *Day. Mart.* 83, and 11 *Jarm. Byth.* 754.

Prec. XII.

Ultimate disposition of the residue—the shares of brothers to them absolutely—sisters to their testamentary appointees or next of kin.

Discretion as to conversion.

Devise of mortgage and trust estates.

[General direction as to investment of trust moneys.]

the same shall attach: AND I FURTHER DIRECT that, on failure of all the trusts hereinbefore declared of the residue of my personal estate, the share thereof originally limited in favour of each of my said brothers shall belong to him absolutely; and the share thereof originally limited in favour of each of my said sisters shall be subject to her testamentary appointment, notwithstanding coverture, and, in default of such appointment, be divisible on her death among her then next of kin (exclusive of a husband) in a course of distribution according to the statutes.

I EMPOWER my trustees to exercise their judgment and discretion in regard to the conversion of such parts of the residue of my personal estate (including shares in joint-stock companies) as shall not be of a perishable or determinable nature; and I declare that the yearly proceeds of such parts thereof as they may accordingly permit to remain unconverted shall be deemed yearly income for the purposes of the trusts hereinbefore declared of such residue. I DEVISE unto and to the use of my said trustees [*names*] all the real estate of which I am or may at the time of my decease be trustee, to be disposed of according to the trusts upon which I hold the same, and also all the real estate of which I am or may be mortgagee, to be disposed of (but subject to the equities of redemption subsisting therein) according to the disposition hereinbefore made of my personal estate. [(z) I DIRECT that all investments of trust moneys to be made by my trustees shall, in the absence of express direction in this my will to the contrary, be made in their names in or upon some one or more of the investments or securities following and those only, that is to say, the public funds, Government securities of the United Kingdom, real or leasehold securities in England or Wales, and not elsewhere, such leaseholds having not less than 60 years unexpired at the time of the investments thereon respectively, or the bonds, debentures or debenture stock, or guaranteed stock or shares of any railway or dock company in England, authorized by special Act of Parliament, and at the time of the investments thereon respectively paying dividends; and I empower my trustees to vary such in-

(z) If the suggestion of n. (x), *ante*, p. 212, be adopted, the clause within brackets may be inserted here; substituting for the previous investment trusts, "to invest in manner hereinafter directed." As to investments by trustees, see note (b), *ante*, p. 103.

vestments, at their discretion, for any other or others of the kinds prescribed; but so that, where any person not under any disability shall, for the time being, be entitled to receive the income of the trust fund as tenant for life, the investment shall not be made or varied without the previous consent in writing of such person, who, if a female, shall have power during coverture to give such consent.] [I EMPOWER my trustees to apply all or any part of the yearly income, to which, under any of the devises, bequests or dispositions hereinbefore contained, each or any infant devisee or legatee (*a*) shall be entitled, or contingently entitled, in possession, towards the maintenance and education, or otherwise for the benefit of such devisee or legatee during his or her minority, or, at the option of my trustees, to pay the same into the hands of the parent or guardian of such devisee or legatee, to be so applied; but for the application whereof by such parent or guardian my trustees shall not be responsible. AND I EMPOWER my trustees, with the consent of the respective prior life owners (if any), and if none, at the discretion of my trustees, to advance and apply any part, not exceeding one-half, of the capital to which, under any of the said bequests or dispositions, each or any infant legatee shall be entitled or presumptively entitled, in or towards his or her advancement or preferment in the world.] I DECLARE that the receipts of my trustees for any money, stocks, funds, shares or securities paid or transferred to them in that character, shall exonerate the persons paying the same from all liability in respect of the application thereof. I DECLARE that the expression "my trustees" used by me in this my will shall be construed as comprising and referring to the trustees or trustee for the time being of this my will. I DECLARE that if either of my trustees herein named shall die in my lifetime, or shall refuse to accept the trusts of my will, it shall be lawful for the other of them surviving me and accepting such trusts, or if neither of them shall survive me and accept the same, then for my said brother [*name*], or his acting executors or executor for the time being, or his administrators or administrator for the time being [*or*, for my acting executors or executor for the time

[General provision for the maintenance of infant devisees and legatees, and advancement of infant legatees generally.]

Receipts of trustees to be discharges.

Power to appoint trustees—providing for death in testator's lifetime, and disclaimer.

(*a*) A general provision to this effect may be introduced where the gifts to infants are numerous.

Prec. XII.

being, or my administrators or administrator for the time being,] to appoint, within six calendar months after my decease, a fit person or fit persons to supply the vacancy or vacancies occasioned by such death or refusal: AND I FURTHER DECLARE that, so often as any trustee or trustees herein named, or to be appointed under this or the preceding power, or by a court of competent jurisdiction or otherwise according to law, shall die, or desire to retire or be discharged, or refuse or become unable or unfit to act, it shall be lawful for the trustees or trustee for the time being competent to act (whether desirous of being discharged or not), or if there shall not be any such trustee, then for my said brother [*name*], or his acting executors or executor, or his administrators or administrator [*or, for my acting executors or executor, or my administrators or administrator*], for the time being, to appoint a fit person or fit persons to succeed to the office of the deceased, retiring, incapacitated or unfit trustee or trustees; and by force of every such appointment as aforesaid all the authorities and discretions given or expressed to be given to the deceased, refusing, retiring, incapacitated or unfit trustee or trustees, shall be conferred upon the appointed trustee or trustees: in whom, either alone or (as the case may be) jointly with the surviving or continuing trustee or trustees, my trust property shall vest, or by proper assurances be vested (*b*); And on every appointment under the first of the

Equitable property vests in the new trustees without conveyance.

(*b*) Interests equitable in their nature (as the benefit of a trust), or not legally assignable (as choses in action), are often formally transferred on the appointment of new trustees; but the appointment alone confers all the fiduciary dominion which can be acquired over such property. Powers of appointing new trustees should not direct the execution of deeds of assurance in such terms as might seem to make the act an essential concomitant of the exercise of the power, without regard to the nature of the property. Indeed the direction to vest the property in the new trustees is mere surplusage, and may always without impropriety be omitted. Where the only trust property consists of stock in the public funds, of course a deed of transfer is not requisite, as the fund is transferred by a mere alteration of names in the books at the Bank of England. Where the personalty is of such a nature as not to require a deed for transferring the trust property, it might be convenient that the donee should be empowered to appoint new trustees by a mere memorandum in writing, especially where the trust property is small, as such a memorandum would not require a stamp (Sweet, Conc. Conv. 121).

two preceding powers, the appointed trustee or trustees shall be considered as coming in under my will, in the same manner as if he or they had been herein named instead of the deceased or refusing trustee or trustees (*c*). I DECLARE that my trustees shall not be answerable for any loss which may arise from their lending any trust moneys on leasehold securities (*d*) without investigating the lessor's title, or otherwise for lending money on mortgage with less than a marketable title. LASTLY, I REVOKE all other testamentary dispositions. IN WITNESS, &c.

(*c*) As the death in the testator's lifetime, or the disclaimer *ab initio*, of devisees or legatees in trust would occasion a lapse, it is proper that the substituted trustees should be constituted devisees and legatees in the place of the deceased or disclaiming trustees. This form, which is more full than that usually inserted in wills or the statutory form supplied by Lord *Cranworth's* Act, 23 & 24 Vict. c. 145 (*ante*, p. 129), applies in its first branch to the common case of the death of a trustee in the testator's life, or the immediate disclaimer of the trustee, in either of which events the mere nomination of a new trustee is sufficient; as he comes in under the will, no conveyance or assignment to him of the trust property is necessary.

Lapse, by death or disclaimer of trustees.

(*d*) The usual trustees' indemnity clause is omitted (see *ante*, p. 112); but as the trustees have power (*ante*, p. 214) to lend money on leasehold securities, they require an indemnity against losses arising from defects in the ground landlord's title, which can rarely be investigated.

No. XIII.

WILL of a MARRIED MAN, *providing for a Wife and his Son, an only Child (a).*—*Bequest of Household Effects to Wife.*—*Pecuniary Legacy to Testator's Mother for Life, then to his Sister absolutely.*—*Devise of Real Estates to Wife for Life.*—*Remainder to Son absolutely, with an Executory Devise, on his Death under Age, to Wife absolutely.*—*Power to lease.*—*Bequest of Residuary Personal Estate to Trustees for Conversion and Investment.*—*Income to Wife for Life.*—*Capital to Son, with Executory Bequest, on his Death under Age, to Wife.*—*Provisions for Maintenance and Advancement of Son.*—*Power to sell Real Estate and invest the Produce, to be held upon the Trusts of the Personal Estate; to postpone the Conversion of Personal Estate; to give Receipts; to appoint Trustees.*—*Appointment of Executors and Guardians.*

Legacies to executors and to friends for rings.

Legacy to trustees, in trust for testator's mother for life, then for his sister absolutely.

Power to vary the investment.

THIS IS THE LAST WILL AND TESTAMENT of me, [*testator's name, residence and quality*]. I BEQUEATH to my trustees and executors hereinafter named, £ — apiece, and to my friends [*names, &c.*], £ — apiece for a ring in remembrance of me. AND I BEQUEATH to my said trustees the sum of £ —, UPON TRUST to invest the same in or on the public funds or Government or real securities in the United Kingdom, or on railway debentures, but not on any other security, and to pay the annual income thereof to my mother [*name*], during her life; and after her decease, to transfer the principal fund to my sister [*name*], for her absolute use; AND I EMPOWER my said trustees or trustee, with the consent in writing of my said mother, to change from time to time the investment of the same sum from any of the said funds or securities to any other or

(a) This precedent should be adopted only in a case where the testator's wife has passed the age of child-bearing.

others of a like nature; AND I DIRECT the aforesaid legacies to be retained or paid at the end of three calendar months after my decease, and the lastly bequeathed legacy to carry interest at the rate of four per cent. per annum from my decease (*b*). I

(*b*) If a legacy, whether pecuniary or of stock, is not paid at the expiration of a year from the testator's decease, or at such other period as the testator may have fixed for its payment, the legatee is entitled to interest at the rate of four per cent. from the end of the year, or such other period respectively, and not before. This rule applies to similar legacies under the will of a married woman in exercise of a power of appointment (*Tatham v. Drummond*, 2 H. & M. 262). And if a testator directs his executors to purchase for A. 500*l*. Three per Cent. Consols, A. is not entitled to call for a transfer until the expiration of a year after the testator's decease, and, therefore, cannot claim the dividends for the interval (*Pearson v. Pearson*, 1 Sch. & Lef. 10). But if the legacy were specific, as where a testator bequeaths a given portion of stock then standing in his name, the legatee would be entitled to the actual produce of the fund from the testator's decease, just as he would be entitled to the rents of a house specifically devised (and see *Dundas v. Wolfe Murray*, 1 H. & M. 425). It is observable too, that the rule which entitles a pecuniary legatee to interest only from the end of a year, applies as well to legacies which are to be invested for the benefit of a legatee for life, as to those which are bequeathed to the legatee absolutely. "If an annuity is given, the first payment is paid at the end of the year from the death: but if a legacy is given for life, with remainder over, no interest is due till the end of two years. It is only interest of the legacy, and till the legacy is payable, there is no fund to produce interest" (*per Lord Eldon*, 7 Ves. 96). But it is doubtful whether, if a sum of money is directed to be invested to produce an annuity, that is to be considered as a legacy payable at the end of the year, or as an annuity payable from the death (*Gibson v. Bott*, 7 Ves. 97). If it be regarded as a legacy, the trustees of the fund, of course, cannot demand payment before the end of a year; the investment then takes place, and (supposing the interest payable half-yearly) the legatee for life receives nothing until the lapse of eighteen months from the testator's death. Such an extended postponement of the enjoyment of the legatee for life would, it is conceived, seldom be consistent with the intention of the testator, and ought, therefore, to be prevented, by expressly making the legacy carry interest from the testator's decease: but a declaration to this effect is of course less requisite where (as in the text) all the legacies are to be paid at an early period after the testator's decease; from which period, according to the doctrine already stated, the interest would begin to run. A consequence of the doctrine that a legacy carries interest from the arrival of the time of payment, and not before, obviously is, that interest does not run on contingent legacies, as the contingency necessarily postpones the payment (*Descrambes v. Tomkins*, 1 Cox, 133; *Tyrrell v. Tyrrell*, 4 Ves. 1): so

As to legacies carrying interest.

Contingent legacy.

Prec. XIII.

Household
goods, &c. to

BEQUEATH all the furniture, plate, linen, china, glass, books, prints, pictures, wines, liquors, fuel, consumable provisions and

Interest on
legacies.

also where legacies are payable out of a reversionary interest in a particular fund, interest is payable on the legacies only from the time of the falling in of the reversion (*Earle v. Bellingham*, 24 Be. 448). A different doctrine from that above mentioned of Lord *Eldon* prevails with respect to a bequest of the residue of personalty for life, with remainder over: contrary decisions will be found in the reports, but the preponderance of recent cases was in favour of the claim of the residuary legatee for life to receive the income, in some shape or other, from the death of the testator; and the question was at length set at rest by a decision of the House of Lords, that the life tenant of the residue takes the whole income thereof during the first year after the testator's death (*Macpherson v. Macpherson*, 1 Macq. 243, 16 Jur. 847; see also *Johnston v. Moore*, 6 W. R. 490).

Gift of resi-
due for life,
with gift
over.

It seems, that where a sum of money is payable primarily out of land, which is not subjected to the testator's debts, so that the payment is not involved in or dependent upon the general administration of the personal estate, the legacy carries interest from the death of the testator (*Spurway v. Glynn*, 9 Ves. 483; *Shirt v. Westby*, 16 Ves. 393; *Davies v. Davies*, Dan. 84. See also *Pearson v. Pearson*, 1 Sch. & Lef. 10; and *Earl of Miltown v. Trench*, 4 C. & F. 276). The old doctrine which made the title to interest depend on the fact whether the fund out of which the legacy is payable does or does not yield immediate profit, seems to be exploded. (See *Gibson v. Bott*, 7 Ves. 89, 97.) And where the residuary personal estate of a testator comprised a bond debt, and, the debtor being insolvent, part only of the principal and interest was recovered many years subsequently to the testator's death; it was held, that the tenant for life of the residue, as against those in remainder, was entitled, not to the sum which had actually been recovered in respect of interest, but only to the interest at four per cent. on the sum which the bond would have realized, if the debtor's estate had been administered at the end of a year after the testator's death (*Turner v. Newport*, 2 Ph. 14). Where a legacy is given in satisfaction of a debt, interest is payable from the testator's death (*Clark v. Sewell*, 3 Atk. 98). As to the interest payable where a testator directs the payment of the debts of another person previously deceased, see *Askew v. Thompson* (4 K. & J. 620). And, if a legacy is directed to be paid at a future time, as to A. on attaining twenty-one, or to B. on attaining that age or marriage, and A. attains twenty-one or B. marries in the testator's lifetime, the legacy will be payable at his decease, and the legatee will be entitled to interest from that period (*Coventry v. Higgins*, 14 Sim. 30).

Legacy pay-
able out of
land.

Interest on
legacy in
satisfaction
of a debt.

In *Noel v. Jones* (16 Sim. 309), a bequest to trustees upon trust to pay and apply 800*l.* in and upon the education of the godson of the testatrix, was held to be an absolute gift to the godson, bearing interest from the expiration of one year from the death of the testatrix. And where a legacy is charged upon real estate, and the devisees in trust are empowered

other household effects of which I shall die possessed unto my dear wife [*name*], absolutely. I DEVISE all the real estate of

wife absolutely.

to raise the same by sale, the 42nd section of the Statute of Limitations (3 & 4 Will. 4, c. 27) does not apply so as to prevent the recovery of more than six years' arrears of interest (*Gough v. Bult*, 16 Sim. 323).

Legacies to infants to whom the testator stands *in loco parentis* are the subject of a peculiar doctrine respecting interest, arising from the moral claim which such objects are considered as possessing to an immediate provision. Such legacies, therefore, if the legatees are not otherwise provided for, will often carry interest before the prescribed time of payment, and even while contingent. Thus, if a testator bequeath a pecuniary legacy, or the residue of his estate, to his children on their attaining majority, or to such children as shall attain majority, the children, though under twenty-one, will (subject to the qualification presently noticed) be entitled to the interest for maintenance from the day of the testator's decease (*Harvey v. Harvey*, 2 P. W. 21; *Conway v. Longville*, 1 Eq. Ca. Ab. 301; *Heath v. Perry*, 3 Atk. 102; *Inoleton v. Northcote*, 3 Atk. 438; 2 Rep. Leg. 1245); or, in case of a posthumous child, from the birth (*Rawlins v. Rawlins*, 2 Cox, 425). An express direction to accumulate the income arising from the residue of the testator's estate, will not exclude the infant legatee from claiming maintenance out of the interest (*Mole v. Mole*, 1 Dick. 310; see, however, *Kime v. Welfitt*, 3 Sim. 533). And even where the testator expressly provides for maintenance during part of the minority, this does not prevent the allowance of interest for the remaining period (*Chambers v. Goldwin*, 11 Ves. 1; *Martin v. Martin*, L. R., 1 Eq. 369). The greatest stretch, however, of the doctrine in favour of provisions for maintenance is exemplified by those cases in which an express allowance made by the testator has been increased (*Aynsworth v. Pratchett*, 13 Ves. 321; *Stretch v. Watkins*, 1 Mad. 253; *Josselyn v. Josselyn*, 9 Sim. 63; *Allen v. Coster*, 1 Be. 202); but in order to warrant such an augmentation, the inadequacy of the testator's allowance must be clearly made out (*Hearle v. Greenbank*, 3 Atk. 716; *Long v. Long*, 3 Ves. 286, n.); and the general rule undoubtedly is, that where the testator has otherwise provided for the maintenance of his infant children, the claim to interest before the period appointed for payment of the legacy cannot be supported (*Wynch v. Wynch*, 1 Cox, 433; *Donovan v. Needham*, 9 Be. 164). And it should seem that, to support an application for maintenance, in any case, it is essential that all the parties concerned in interest (including the ulterior legatees, if any, who would be entitled in any possible event) should concur; and if the gift is so framed as to admit after-born issue, the Court will not apply any portion of the income for the maintenance of the existing issue, although the persons entitled on failure of issue may acquiesce (*Kime v. Welfitt*, 3 Sim. 533). However, where the gift has proceeded from the parent of the infant, or a person *in loco parentis*, and the subject-matter is a residuary personal estate, maintenance will be allowed to the members of a class, even

Interest on legacies to children.

Maintenance of children.

Prec. XIII.

Real estate
to wife for
life,

whatsoever tenure and wheresoever situate (including chattels real) to which I shall at my decease be entitled, either in possession, reversion or otherwise (except estates vested in me as trustee or mortgagee), unto my said wife [*name*], and her as-

Interest on
legacies to
infants, for
maintenance.

when their interests are contingent, if the chances of each ultimately becoming entitled are equal, and no other person is interested (*Fairman v. Green*, 10 Ves. 45; *Ex parte Kebble*, 11 Ves. 604; *Turner v. Turner*, 4 Sim. 480; *Errat v. Barlow*, 14 Ves. 202; *Cannings v. Flower*, 7 Sim. 523; *Aynsworth v. Pratchett*, 13 Ves. 321). But where the infant's interest in real estate (*Green v. Ekins*, 2 Atk. 473; *Bullock v. Stones*, 2 Ves. s. 521), or in a particular trust fund (*Leake v. Robinson*, 2 Mer. 384), is contingent, the intermediate income (until the happening of the contingency) will belong to the heir or residuary devisee, or to the next of kin or residuary legatee, as the case may be (see *ante*, p. 126); and such income cannot be applied for the infant's benefit, unless the application is directed or sanctioned by the will. The gift for the infant's benefit must proceed from its parent or from a person who has put himself in the place of its parent; for maintenance (as a rule) will be refused out of a contingent interest, or where the fund is limited over, if the gift proceeds from a stranger, or even from a grandfather to his grandchild (*Errington v. Chapman*, 12 Ves. 20; *Crickett v. Dolby*, 3 Ves. 10; *Greenwell v. Greenwell*, 5 Ves. 194; see, however, *Acherley v. Vernon*, 1 P. W. 783; *Boddy v. Daves*, 1 Ke. 362), or where the infant is a natural child, if not recognized and adopted by its father (*Lowndes v. Lowndes*, 15 Ves. 301; and see Hill on Trustees, 399, *et seq.*). It should be observed, that the doctrine which entitles children to interest by way of maintenance does not extend to adults (*Lowndes v. Lowndes*, 15 Ves. 301; see also *Raven v. Waite*, 1 Sw. 553, 558; *Wall v. Wall*, 15 Sim. 513); nor, in general, to an infant whose parent is living, as the testator, in regard to such an object, does not stand *in loco parentis* (*Lomax v. Lomax*, 11 Ves. 48; *Errington v. Chapman*, 12 Ves. 20), unless there is distinct evidence of an intention to assume the parental office in regard to providing for the infant (*Ponys v. Mansfield*, 3 M. & C. 359): nor, it is presumed, would it apply where the infant is married. It has often been a question whether the title to maintenance, under an express provision, ceases on marriage (*Chambers v. Goldwin*, 11 Ves. 1; *Bowden v. Laing*, 14 Sim. 113; *Conolly v. Farrell*, 8 Be. 347; see also *Staniland v. Staniland*, 34 Be. 536; *Scott v. Key*, 35 Be. 291). As to the applicability of the general doctrine discussed in this note to illegitimate children, see *Beckford v. Tobin* (1 Ves. s. 308); *Raven v. Waite* (1 Sw. 553); *Newman v. Bateson* (3 Sw. 689); *Dowling v. Tyrell* (2 R. & M. 343); *Rogers v. Soutten* (2 Ke. 598); *Hill v. Hill* (3 V. & B. 183).

Illegitimate
children.

See, also, as to the time of payment of legacies and interest, the notes to *Ashburner v. Macquire*, in 2 Tud. L. C. Eq. 283.

signs, for her life, without impeachment of waste, so far as I can grant that privilege, and after her decease, unto my son and only child [*name*], his heirs, executors, administrators and assigns; but if my said son shall die under the age of twenty-one years (*c*) [*or*, under the age of twenty-one years without leaving issue], then I devise the same real estate and chattels real unto my said wife, her heirs, executors, administrators and assigns; AND I

remainder to testator's son and only child absolutely, but, in the event of his death under age, to wife absolutely.

(*c*) The day of a person's birth is included in computing his age for testamentary purposes; which, coupled with the fact that the law does not generally recognize fractions of a day (*fractionem diei non recipit lex*), leads to the singular result that a person may, according to legal computation, attain his majority nearly two days before he has actually completed twenty-one years. Thus, suppose A. to be born (however short a time) before midnight on the 5th November, 1833, that day is to be included; if he lived (however short a time) beyond midnight of the 3rd November, 1854, so as to have entered upon the 4th November, the latter day must also be counted, fractions not being recognized; and thus A. legally attained his majority, and could execute a valid will, at the first instant of the 4th November, 1854; although, computing the time *de momento in momentum*, nearly forty-eight hours would still be wanting to complete twenty-one years from the instant of his birth.

Mode of computing age.

Fractions of a day not generally recognized by the law.

A person attains "his twenty-fifth year" when he becomes twenty-four years old (*Grant v. Grant*, 4 Y. & C. Ex. 256). To recur to the former example, A. attained his twenty-fifth year, in legal computation, at the first instant of the 4th November, 1857.

Judgment signed on the day of, but subsequently to, the death of a defendant is well signed (*Wright v. Mills*, 5 Jur., N. S. 771), on the principle that judicial proceedings are to be taken to date from the earliest minute of the day on which they are done (*Edwards v. Reginam*, 9 Exch. 628), or on the principle that judicial acts shall have precedence of the acts of a private party, when both date from the same day.

If an act is required to be done within six calendar months after the death of testator, the computation is exclusive of the day of the death; so that if the death take place on the 12th of January, the last day for performance of the act is the 12th of July (*Lester v. Garland*, 15 Ves. 248; *Gorst v. Lowndes*, 11 Sim. 434).

The law, however, does not, for all purposes, reject fractions of a day. Thus, several deeds executed on the same day take effect in the order of their delivery; and an execution issued on the same day as, but after, an act of bankruptcy committed is over-reached by the prior act of bankruptcy (*Ex parte Dobree*, 8 Ves. 82; see also *Taylor v. Horde*, 1 Bur. 106, Yelv. 138; *Barker v. Goodair*, 11 Ves. 78; *Wydown's Case*, 14 Ves. 80; *Ib.* 554 (*n*)). See also *Thomas v. Thomas* (27 Be. 537), for another case in which the indivisibility of the day was not maintained.

Fractions of a day recognized in some cases.

Prec. XIII.

Power to wife, and after her death to trustees, during minority of son, to grant leases.

Residue of personal estate to trustees, upon trust to get in and invest, &c.;

—to permit wife to receive the income for her life;

—capital to testator's son, but, in the event of his death under age, to wife.

Power to vary the investment.

EMPOWER my said wife during her life (*d*), and after her decease the trustees or trustee for the time being of my will, during the minority of my said son, to grant leases of my said real estate (*e*), or any part or parts thereof, for any term or terms of years not exceeding [*twenty-one*] years in possession, at the best rent, without taking any fine or premium, and upon such terms, in other respects, as the lessors or lessor shall think reasonable. I BEQUEATH the residue of my personal estate to my trustees hereinafter named, UPON TRUST to convert and get in the same, and invest the moneys to arise therefrom in or on the public funds or Government or real securities in the United Kingdom, but not in or on any other investment or security; AND UPON FURTHER TRUST to permit and empower my said wife to receive the annual income of the said moneys, or the securities whereon the same shall be invested, during her life; And after her death, as to the same moneys and securities, and the annual income thenceforth to become due for the same, IN TRUST for my said son, his executors, administrators and assigns: But if my said son shall die under the age of twenty-one years, [*or*, under the age of twenty-one years without leaving issue], then IN TRUST for my said wife, her executors, administrators and assigns; AND I EMPOWER my said trustees or trustee (*f*), with the consent in writing of my said wife,

(*d*) See *ante*, p. 177, as to power of tenant for life to grant leases, 19 & 20 Vict. c. 120, s. 32. In case the Act is relied on, the form would run:—

“And I empower the trustees or trustee for the time being of my will, after the death of my said wife, and during the minority of my said son, to grant,” &c.

(*e*) See *ante*, p. 168, n. (*d*).

Remarks upon the power to vary securities.

(*f*) Without an express authority, and independently of statutory authority, trustees are not justified in transferring to any new security funds which have been once invested pursuant to the trusts; for though such new security might, consistently with the trusts, have been originally adopted, yet the trustee, having made the investment on another species of security is, in this particular, *functus officio*. (But see Sugd. V. & P. 663.) The same principle applied of course to funds composing part of the estate at the testator's decease, and which a due execution of the trusts did not require to be converted. But now see the provisions of 23 & 24 Vict. c. 145, s. 25, stated *ante*, p. 106, which, however, authorizes a change of investment only in parliamentary stocks or public funds or government securities.

whether covert or sole, and after her decease and during the minority of my said son, in the discretion of my said trustees or trustee, to change from time to time the investment of the last-mentioned moneys from any of the said funds or securities to any other or others of the like nature. I FURTHER EMPOWER my said trustees or trustee, after the decease of my said wife, to apply such part as they or he shall deem expedient of the income of the real and personal property hereinbefore devised and bequeathed to or in trust for my said son, in or towards his maintenance and education, or otherwise for his benefit, during his minority; AND I DIRECT my said trustees or trustee to accumulate, during his minority, the unapplied income, by investing the same, with power to vary the investment as aforesaid, and to add the accumulations thereof to the capital of the personal property so bequeathed. I FURTHER EMPOWER my said trustees or trustee, with the consent in writing of my said wife, whether discover or covert, during her life, and after her decease and during the minority of my said son, in the discretion of my said trustees or trustee, to apply any part or parts of the personal property so bequeathed as last aforesaid, or of the said accumulations, not exceeding in the whole the sum of £ —, in or towards the advancement or preferment in the world of my said son. I FURTHER EMPOWER my said trustees or trustee, if they or he shall think it advantageous so to do, at any time or times, with the consent in writing of my said wife, whether discover or covert, and after her decease and during the minority of my said son, in the discretion of my said trustees or trustee, to sell my said real estate, or any part or parts thereof, [together or in parcels, by public sale or private contract, and convey the real estate so sold unto or according to the direction of the purchaser or purchasers thereof, with power to make any special conditions of sale as to the title or evidence

Provision for the maintenance of son.

Accumulation.

Advancement of son.

Power to trustees to sell real estate, and invest produce, to be held upon the trusts before declared of the residuary personal estate.

It seems proper in general that the power to vary the securities should be placed under the control of the person entitled to the immediate income, whose interest is most directly involved in its due and impartial exercise; for instance, a transfer from Reduced Three per Cent. Stock to Three per Cent. Consols would have the effect of postponing or accelerating, as the case might be, for three months, the dividend for the current half-year, the one being payable in April and October, and the other in January and July.

Power to vary securities.

Prec. XIII.

Power to postpone the getting in of personal estate—the yearly proceeds to be deemed annual income.

Devise of mortgage and trust estates.

Power to trustees to give receipts.

Power to appoint trustees.

of title or otherwise, and with power to buy in the premises at any public sale, or to rescind either on terms or gratuitously any contract, and to resell, without being answerable for any loss (g)]; AND I DIRECT that my said trustees or trustee shall invest the moneys to arise from the sale thereof in the manner hereinbefore directed concerning the moneys to arise from my residuary personal estate, and shall hold the funds or securities whereon such investment shall be made, upon the trusts hereinbefore contained concerning the funds or securities whereon the produce of my residuary personal estate may be invested. I DECLARE that my said trustees or trustee shall have a discretionary power to postpone, for such period as to them or him shall seem expedient, the conversion or getting in of any part of my residuary personal estate which shall at my decease consist of shares in public companies, or of stocks, funds or securities of any description whatsoever; but the outstanding personal estate shall be subject to the trusts hereinbefore contained concerning the moneys and funds and securities aforesaid, and the yearly proceeds thereof shall be deemed annual income for the purposes of such trusts. I DEVISE all real estates which shall at my decease be vested in me as trustee or mortgagee to my trustees hereinafter named, subject to the equities affecting the same respectively. I EMPOWER the trustees or trustee for the time being of my will to give receipts for all moneys, stocks, funds, shares and effects to be paid, transferred or delivered to such trustees or trustee by virtue of my will, and declare that such receipts shall exonerate the persons taking the same from all liability to see to the application or disposition of the money or effects therein mentioned, and as to any purchaser from inquiring into the necessity for or propriety of any sale or sales purporting to be made under the powers of this my will. I DECLARE that a new trustee or new trustees of my will may from time to time be appointed by my said wife during her life by writing under her hand, and subject as aforesaid in the

23 & 24 Vict. c. 145, Part I.

(g) This being a power of and not a trust for sale, the clause in brackets would be supplied by 23 & 24 Vict. c. 145, Part I., s. 1. The rest of Part I. appears inapplicable to the dispositions contained in this Precedent. If the Act has any operation in such a case, it should be allowed to operate silently, no express reference to its provisions, or any of them, being necessary.

Prec. XIII.

Appointment of trustees, executors and guardians.

manner prescribed by law. I APPOINT my friends [*names and descriptions*], to be trustees of my will; and I appoint my said wife [*name*] and the said [*trustees*] to be executrix and executors of my will, and guardians (*h*) of my said son [*name*]

(*h*) Previously to 4 & 5 Ph. & Mar. c. 8 (repealed by 9 Geo. 4, c. 31), a man had no power to appoint by his will guardians of his children. But the second section of that Act, by construction, enabled a father to appoint, by his last will and testament, or otherwise, guardians for his female children under the age of sixteen. This power was extended by 12 Car. 2, c. 24, (14 & 15 Car. 2, c. 19, Ireland), the 8th section of which (see Appendix) authorizes a father, whether of age or not, to dispose, by deed or by his last will and testament, of the custody and tuition of any of his children under the age of twenty-one years, and unmarried at the time of his death, during the time such child or children should remain under the age of twenty-one years, or for any less time. The Wills Act expressly includes within its scope (*ante*, p. 1), "a disposition by will and testament or devise of the custody and tuition of any child" by virtue of the above statute, and deprives a father who is under twenty-one of the power of appointing by will guardians of his children. His power of appointing by deed, however, still remains; as to the credibility of a witness to the execution of a deed by a minor appointing a guardian under the 12 Car. 2, c. 24, s. 8, see *Morgan v. Hatchell* (19 Be. 86). As the stat. 12 Car. 2, c. 24, confines the power of appointing a testamentary guardian to the father, such an appointment by the mother is void (*Ex parte Edwards*, 3 Atk. 519); nor does the statute extend to illegitimate children, although the Court of Chancery will usually appoint the person named by the reputed father to be the guardian of such children (*Ward v. St. Paul*, 2 Br. C. 583; *Peckham v. Peckham*, 2 Cox, 46; *Chatteris v. Young*, 1 J. & W. 106).

As to appointment of guardians. 4 & 5 P. & M. c. 8.

12 Car. 2, c. 24.

1 Vict. c. 26.

Mother.

Illegitimate.

Probate.

Office survives.

Married children.

It is not necessary to prove a testamentary appointment of guardians in the Probate Court, but such an appointment is to be proved in the same manner as a deed (*Gilliat v. Gilliat*, 3 Phillim. 222; *Lady Chester's Case*, 1 Ven. 207; *Re Morton*, 3 Sw. & Tr. 422). Where several testamentary guardians are appointed, the right of guardianship will vest in the survivors or survivor, although the will contains no words declaring that it shall survive (*Eyre v. Countess of Shaftesbury*, 2 P. W. 106); but *contra*, if the guardians are appointed by the Court (*Bradshaw v. Bradshaw*, 1 Rus. 528; *Hall v. Jones*, 2 Sim. 41).

The power of appointing guardians does not extend to infant children who are married at the father's death; yet, if then unmarried, the guardianship is not determined by the subsequent marriage (*Earl of Shaftesbury's Case*, cited 3 Atk. 625).

As to the office and power of the testamentary guardian, see *Duke of*

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during his minority. LASTLY, I REVOKE all other wills. IN WITNESS, &c.

As to guar-
dians.

Beaufort v. Berty (1 P. W. 703); *Gardner v. Blane* (1 Ha. 381), and the cases cited in the note.

As to what words in a will are sufficient to appoint a guardian, see *Miller v. Harris* (14 Sim. 540).

As to a testamentary guardianship extending to children by a future marriage, and as to revocation of an appointment of guardians, see *Ex parte Lord Ilchester* (7 Ves. 348).

As to the rights of joint testamentary guardians, as against each other, see *Gilbert v. Schwenck* (14 M. & W. 488).

As to the jurisdiction of the Court in controlling the powers of testamentary guardians, see *Ingham v. Bickerdike* (6 Mad. 275), and the cases cited in the note; *Talbot v. Earl of Shrewsbury* (4 M. & C. 672).

A testamentary guardian is entitled to administration for the benefit of the infants in preference to a guardian elected by them (*Re Morris*, 2 Sw. & Tr. 360).

As to the domicile of guardians and wards, see Appendix.

As to inquiry prior to an appointment of guardians by the Court, see *Whitelock v. Finch* (3 Y. & C. Ex. 724); *Re Cook* (15 Jur. 836).

As to the jurisdiction of the Court of Chancery to deprive a father of the guardianship of his children, see *Re Fynn* (2 De G. & S. 457).

2 & 3 Vict.
c. 54.
20 & 21 Vict.
c. 85.
22 & 23 Vict.
c. 61

See further, as to the custody of infants, 2 & 3 Vict. c. 54; 20 & 21 Vict. c. 85, s. 35 (the Divorce Act); 22 & 23 Vict. c. 61, s. 4. Where an order had been made under 2 & 3 Vict. c. 54, giving the custody of an infant to a wife living apart from her husband, it was held that the reasonable expenses of providing for the child were part of the reasonable expenses of the wife, for which she had authority to pledge her husband's credit (*Bazeley v. Forder*, L. R., 3 Q. B. 559).

And, lastly, on the subject of guardian and ward in general, see *Eyre v. Lady Shaftesbury*, in 2 Tud. L. C. Eq. 588—664.

No. XIV.

WILL of a MARRIED MAN, providing for a Wife and Younger Children by Name; the Eldest Son having been provided for.—Rent-Charge to Wife, reducible on Marriage.—Residue (Real and Personal) to Younger Children, with Executory Limitations between them and the Eldest Son (a).

THIS IS THE LAST WILL AND TESTAMENT of me, [*testator's name, residence and quality*]. I APPOINT my friends [*names, &c.*], to be trustees of my will; and I appoint my wife [*name*], she continuing my widow, and the said [*trustees*], to be executrix and executors of my will, and guardians of my children during their respective minorities. I BEQUEATH to my said wife all my household furniture, plate, linen, glass, china, books, pictures, prints, wines, liquors, fuel, housekeeping stores and provisions and other effects of the like nature, and the sum of £ —, to be paid to her out of the first moneys which shall come to the hands of my executors. I BEQUEATH to my eldest son [*name*] (for whom I have already provided), the sum of £ — only, to be paid to him at the end of — calendar months next after my decease. I DEVISE to my said wife a yearly rent-charge of £ — for her life, if she shall so long continue my widow; but if she shall marry again, then a yearly rent-charge of £ — only for the remainder of her life, the said yearly rent-charge of £ — or £ — (as the case may be) to be charged upon and issuing out of all the freehold here-

Appointment of trustees, executors and guardians.

Moveables and a pecuniary legacy to wife.

Pecuniary legacy to eldest son.

Rent-charge to wife, reducible on marriage.

(a) This Precedent disposes of the testator's property amongst his children *nominatim*. In case of the death of any child in the testator's lifetime, leaving issue any of whom survive the testator, the ownership of such deceased child's share would be governed by the provisions of 1 Vict. c. 26, s. 33 (*ante*, p. 56). But the will does not provide for after-born children, or for the possible case of the testator's wife being pregnant at the time of his death. This form, like the previous one, ought not to be adopted except in the case of a testator whose wife is past the age of child-bearing (see *ante*, p. 218).

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ditaments [*or*, the freehold hereditaments situate in the county of —] to which I shall be entitled at my decease, and to be payable half-yearly, without deduction; and the first payment of the said yearly rent-charge of £ — to be made at the end of six calendar months computed from my decease, if my said wife shall be then living and my widow, and the first payment of the said yearly rent-charge of £ — to be made at the end of six calendar months computed from the second marriage of my said wife, and a proportionate part of each yearly rent-charge to be paid down to the determination thereof. AND I EMPOWER my said wife, by distress, and also by entry upon and perception of the rents and profits of my said hereditaments so charged as aforesaid, to recover payment of the said rent-charges respectively, when in arrear for twenty-one days. I DEVISE AND BEQUEATH all the real estate, and the residue of the personal estate, to which I shall be entitled at my decease (but, as to my freehold hereditaments so charged as aforesaid, subject to such of the said rent-charges as shall for the time being be payable) unto my younger children [*names*], in equal shares, as tenants in common in fee; But if any of them shall die under the age of twenty-one years without leaving issue, Then I DEVISE and bequeath the share or shares, as well accruing as original, of such of them as shall so die, to my said eldest son, and to the others or other of my said younger children, in equal shares, as tenants in common in fee. AND I DIRECT AND EMPOWER my trustees hereinbefore named, during the minorities of such of my said younger children as shall be under age at my decease, to receive the annual income of their respective shares of my real and residuary personal estate, and to apply the same, or so much thereof as such trustees shall think expedient, in or towards the maintenance and education, or otherwise for the benefit, of such children respectively, and to invest and accumulate the unapplied surplus, and add the accumulations to the respective shares whence the same shall have arisen; and also to apply, in or towards the advancement (*b*) in

Real estate and residue of personal estate among younger children, with executory limitations between them and the eldest son.

Provisions for maintenance and advancement of younger children.

Advancement of infants.

(*b*) Without the sanction of the Court, trustees cannot with safety, in the absence of an express power, break in upon the trust fund for the advancement of an infant (*Walker v. Wetherell*, 6 Ves. 472). Powers of advancement must be followed strictly; for example, where a power was to

the world of such children respectively, any part, not exceeding one-half, of the principal or value of their respective shares, and for that purpose to raise, by mortgaging or charging my real estate, or any part or parts thereof, such sum or sums of money, as my said trustees shall think fit. I ALSO DIRECT AND EMPOWER my said trustees to convert and get in my residuary personal estate, as and when they shall think fit, and to invest the net proceeds thereof, at their discretion, in their names, in or upon the public stocks or funds of the United Kingdom, or on real securities in England or Wales, but not in or upon any other investments or securities, and at the like discretion to vary the investments for any other or others of a like nature, when and as they shall think fit, until the same shall become distributable under the dispositions hereinbefore contained. I ALSO DIRECT AND EMPOWER my said trustees, during the minorities or minority of such of my said younger children as shall be under age at my decease, to let my said real estate from year to year, or for any term not exceeding [seven] years in possession, at the best rent, and subject to such covenants and conditions as my said trustees shall think reasonable, and generally to manage and direct all the affairs and concerns of my said real estate and residuary personal estate, so far as regards the share and interest, or respective shares and interests, of the minor or minors, in such manner as my said trustees shall in their discretion judge most beneficial to such minor or minors. I DECLARE AND DIRECT that any mortgage which shall be executed by my said trustees may, in their discretion, either contain or not contain a power of sale; and that any mortgagee

Power to convert residue of personality.

Power to let, manage, and settle affairs;

be exercised with the concurrence of two trustees, an advancement made by one only was not allowed on passing the accounts, although that one alone had acted in the trust (*Palmer v. Wakefield*, 3 Be. 227). Where the trust fund is given over, in case of the death of the infant under twenty-one, no part of the capital can be applied for the infant's advancement even by the Court in the absence of an express power created by the instrument, still less can the trustees apply the fund of their own authority (*Lee v. Brown*, 4 Ves. 362). However, an advancement may be made in such cases if the parties entitled in remainder, being competent, appear and give their consent (*Evans v. Massey*, 1 Y. & J. 196). See also *Hill on Trustees*, 399, *et seq.*; and *Re Kershaw's Trusts* (L. R., 6 Eq. 322), as to advancement of a married woman "at any period of her life."

Advancement.

Prec. XIV.

—and to give
discharges.

Trust estates.

Power to ap-
point trus-
tees.

shall not be bound to inquire into the necessity (c) of raising the moneys advanced by him. I ALSO EMPOWER my said trustees to give effectual discharges for all moneys paid to them as such trustees. I DEVISE to my said trustees [*names*] all the real estates which shall at my decease be vested in me as mortgagee or trustee, subject to the equities affecting the same respectively. I DECLARE that a new trustee or new trustees of my will may, from time to time, be appointed by my said wife during her widowhood by writing under her hand, and subject as aforesaid in the manner prescribed by law. AND I DECLARE that the powers and discretions hereinbefore vested in the trustees hereinbefore named shall be exerciseable by the trustees or trustee for the time being of my will. LASTLY, I REVOKE all other wills. IN WITNESS, &c.

23 & 24 Vict.
c. 145, Part II.

(c) See 23 & 24 Vict. c. 145, Part II. ss. 11—24, as to the powers incident to mortgages, and see also s. 32 as to negating those powers. The insertion of these words in the text appears advisable, notwithstanding the sections of the Act just referred to; since by those sections the mortgagee is not relieved from seeing to the necessity of raising the money.

No. XV.

WILL of a MARRIED MAN, providing for a Wife and Adult Children.—Bequest to Wife of Wines, &c. and the Use of Furniture.—Real Estate, and Residue of Personal Estate, vested in Trustees for Sale and Conversion; Income to Wife for Life.—Legacy out of Capital to one Child, and Surplus among the other Children; Share of Daughter for her separate Use.—Trustees not to sell Real Estate in Wife's Lifetime without her Consent, and to be at liberty to postpone the Conversion of Personalty.—Devise of Mortgage and Trust Estates.—Powers to give Receipts and appoint Trustees.—Appointment of Executors.

THIS IS THE LAST WILL AND TESTAMENT of me, [*testator's name, &c.*]. I BEQUEATH the wines, liquors, fuel, and other consumable household stores and provisions, and the linen, china and glass, of which I shall die possessed, to my dear wife [*name*], absolutely. I BEQUEATH to my said wife the use and enjoyment, during her life, of the household furniture and utensils not hereinbefore bequeathed, and the plate, books, pictures and prints of which I shall die possessed; And after her decease, I DIRECT the same articles to be disposed of as part of the residue of my personal estate [*or, I BEQUEATH the same to my four children [names], to be divided between them as nearly as may be in equal shares, and if (a) any dispute shall arise concerning the division thereof, then such division shall*

Bequest of wines, &c. to wife.

Bequest of the use of furniture, &c. to wife for life, then to fall into the residue;

—[*or, to be divided between testator's children—division to be made by trustees.*]

(a) Executors were directed to distribute between the testator's wife and sons (six in number) such portions of his plate, &c. as they should judge expedient, and to sell the rest; the proceeds of sale fell into the residue, which was given to three of the sons in equal shares; the only executor who proved was one of the sons, who took the largest share of the plate, &c. for himself; under the circumstances of the case, such distribution was held to be authorized by the will (*Davis v. Davis*, 1 H. & M. 255).

Executor's discretion; distribution of specific chattels.

Prec. XV.

Inventory of
furniture, &c.
to be taken.

Devise of
real and re-
siduary per-
sonal estate
to trustees,
upon trust to
sell, get in
and invest ;

be made by the trustees or trustee for the time being of my will, whose determination shall be final.] AND I DIRECT my executors to cause an inventory to be taken of the same articles before the delivery thereof to my said wife, and two copies of such inventory to be signed by my said wife, of which copies so signed one shall be delivered to her, and the other be kept by my executors (b). I DEVISE all the real estate to which I shall be entitled at my decease (except estates vested in me as trustee or mortgagee), and I bequeath the residue of the personal estate to which I shall be then entitled, to [*names, &c.*], their heirs, executors, administrators and assigns respectively, UPON TRUST to sell my real and leasehold estates, together or in parcels, by public auction or private contract, with power to make any special conditions as to title or evidence of title, or otherwise, and with power to buy in the premises at any public sale, or to rescind either on terms or gratuitously any contract, and to resell, without being answerable for any consequent loss ; And to convey and assign the premises respectively so sold to the purchaser or purchasers thereof ; And to convert and get in my other residuary personal estate, and invest the moneys to arise from such real and leasehold estates, and residuary personal estate, in the names or name of the trustees or trustee for the time being of my will, in or upon [*ut ante*, p. 214], with liberty for the said trustees or trustee, with the consent in writing of my said wife, to vary and transpose the investment from time to time for any other investment of the description

As to secu-
rity required
from legatees
for life, or
conditional
legatees.

(b) This direction is in accordance with the rule of equity, by virtue of which the interference of the Court on the part of an ulterior legatee of chattels is at present restricted to the requisition of an inventory from the legatee for life. To support the demand of security, formerly required, a special case of actual danger must now be made out (*Foley v. Burnell*, 1 Br. C. 279 ; *Conduitt v. Soane*, 1 Col. 285). Indeed, even where a pecuniary legacy is made liable to be defeated by a subsequent contingency, the legatee (the time of payment having arrived) is entitled to receive it without giving security, as a Court of Equity will not exact from a legatee what the testator has not required. Thus, where a testator bequeathed 1,000*l.* to A., but on condition that, if she succeeded to a particular estate by the determination of a certain estate tail then subsisting in B., the legacy should be void ; it was held, that A. was entitled to be paid the legacy in the lifetime of B. without security (*Fawkes v. Gray*, 18 Ves. 131 ; see also *Griffiths v. Smith*, 1 Ves. j. 97).

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aforesaid; AND UPON FURTHER TRUST to permit and empower my said wife to receive the annual income of the said moneys, or the stocks, funds and securities whereon the same shall be invested during her life; And after her death, As to the same moneys, stocks, funds and securities, and the annual income thenceforth to become due for the same, UPON TRUST to pay thereout to my said son [*name*], his executors, administrators or assigns, the sum of £ —, which sum shall be absolutely vested in him on my decease (*c*), and shall carry interest after the rate of 4 per cent. per annum from the decease of my said wife until payment thereof; And, subject to the payment of the same sum and interest, IN TRUST for my other children [*names*], to be divided equally among them, their respective executors, administrators and assigns; and the respective shares of such children to be absolutely vested on my decease; and the share of my said daughter [*name*] to be received, enjoyed and disposed of by her as her separate estate without the control or interference of her present or any future husband, and her receipt to be, notwithstanding coverture, an effectual discharge for the same (*d*). I DECLARE that no sale of my real estate, or any part thereof, shall be made in the lifetime of my said wife, without her previous consent (*e*) in writing; and

—to permit wife to receive the income for life;

—after her death to pay legacy to one of testator's children, with interest from her death;

—to divide the surplus between the other children;

—daughter's share for her separate use.

Trustees prohibited from selling real estate in wife's life-

(*c*) Having regard to the established rules of construction respecting the vesting of estates and interests, this declaration may appear superfluous: but in preparing legal instruments in general, and more especially wills, some concession may be usefully made to popular notions; for it seems desirable, if possible, that wills should be so framed as to disclose the testator's intention to the most unlearned reader of the document. Considering how often the vesting of legacies is a subject of dispute, scarcely any degree of explicitness on the point can be deemed excessive.

Express direction as to vesting.

(*d*) The children being named and not described as a class, the provisions of sect. 33 will be applicable in case any child pre-decease the testator. See *ante*, pp. 56—58.

(*e*) A testator devised real estate to trustees upon trust to sell and hold the proceeds in trust for his sons and daughters, but empowered them to divide the real estate *in specie* amongst the sons and daughters, and declared that no sale should be made without the consent in writing of his sons and daughters; it was held that the trustees could not sell after the death of one of the daughters, even with the concurrence of the other children and of the person absolutely entitled to the deceased daughter's share (*Sykes v. Sheard*, 33 Be. 114), or at all events that the title was too doubtful to be forced upon a purchaser (2 D. J. & S. 6).

Trust for sale with consent; death of one of consenting persons.

Prec. XV.

time without her consent, and empowered to postpone the conversion of personal estate—unsold real estate to be deemed personal.

Devise of trust and mortgage estates.

Power to give receipts.

Power to wife, and after her

Propriety of an express authority to suspend the conversion.

Failure of purposes of conversion.

that my trustees or trustee for the time being shall have a discretionary power to postpone for such period as to them or him shall seem expedient, the conversion or getting in of any part of my residuary personal estate, which shall at my decease consist of stocks, funds, shares or securities of any description whatever; but the unsold real estate and outstanding personal estate shall be subject to the trusts hereinbefore contained concerning the moneys, stocks, funds and securities aforesaid, and the rents and yearly produce thereof shall be deemed annual income for the purposes of such trusts, and such real estate shall be transmissible as personal estate under the ultimate trust hereinbefore contained (*f*). I DEVISE all real estates (if any) vested in me as trustee or mortgagee to the said [*trustees*], their heirs and assigns, subject to the equities affecting the same respectively. I EMPOWER the trustees or trustee for the time being of this my will to give receipts for all moneys and effects to be paid or delivered to such trustees or trustee by virtue of my will, and declare that such receipts shall exonerate the persons taking the same from liability to see to the application or disposition of the moneys or effects therein mentioned. I DECLARE that if my said trustees [*names*], or any of them, shall die in my

(*f*) A declaration to this effect should always be inserted where a discretionary power is lodged in trustees or others to suspend the conversion of the property, as otherwise the question occurs, whether the property is to be considered, for the purposes of transmission, as converted, until it actually becomes so. Where the direction to sell and convert forthwith is absolute and imperative, the doctrine, that the property, in contemplation of equity, becomes immediately impressed with the qualities belonging to its destined character is so well settled and known (see *Fletcher v. Ashburner*, 1 Br. C. 499), that a clause declaratory of the testator's intention on the point is less important.

It is immaterial in regard to the converting effect of a direction to sell, whether the persons who are so directed to sell take the legal estate upon trust for sale, or only a power of sale, provided that the power is imperative, and therefore in the nature of a trust (*Elliott v. Fisher*, 12 Sim. 505).

Where a testator directs the sale of realty for purposes which wholly fail, his heir takes as realty; but if the failure be partial only, the heir takes the surplus of the conversion fund as personalty (*Smith v. Claxton*, 4 Mad. 484; *Bagster v. Fackerell*, 26 Be. 469; *Wilson v. Coles*, 28 Be. 215).

See the doctrine of conversion discussed in the notes to *Fletcher v. Ashburner*, 1 Wh. & Tud. L. C. Eq. 741; and 1 Jarm. Wills, ch. 19.

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death to
trustees for
the time
being, to ap-
point trust-
tees.

lifetime, or if they or any of them, or any person or persons to be appointed under this clause, or by a Court of competent jurisdiction or otherwise according to law, shall, after my death, die, or be unwilling, incompetent or unfit to execute the trusts of my will, or desire to retire from the office, it shall be lawful for my said wife during her life, and, after her death, for the competent trustees or trustee for the time being, if any, whether retiring from the office of trustee or not, or, if none, for the acting executors or executor for the time being, or the administrators or administrator for the time being, of the last surviving trustee, to substitute, by any writing under her, his or their hand or hands, any fit person or persons, in whom alone, or, as the case may be, jointly with the surviving or continuing trustees or trustee, my trust estate shall vest, or, by proper assurances, be vested. I APPOINT the said [*trustees*] to be executors of my will. LASTLY, I REVOKE all other wills. IN WITNESS, &c.

Appointment
of executors.

No. XVI.

WILL of a MARRIED MAN, disposing of Personal Property in favour of his Wife and Children.—Furniture, &c. bequeathed to Wife absolutely; Income of Residue to Wife during Widowhood; Capital to Children and Issue living at her Death or Marriage, per Stirpes; Husbands and Widows of deceased Children to participate; Maintenance and Advancement.—Directions as to Investment of Residue, with Power to continue Investments, and special Provisions as to what shall be deemed Income.—Powers to give Receipts, appoint Trustees, &c.

THIS IS THE LAST WILL AND TESTAMENT of me, [*testator's name, &c.*]. I APPOINT [*names, &c.*] to be trustees and executors of my will; and I appoint my dear wife [*name*], during her widowhood, to be guardian, and after her death or marriage the said [*trustees*] to be guardians of my infant children. I BEQUEATH the household furniture (*a*), plate,

Appointment
of executors
and guar-
dians.

Request of
furniture to
wife,

Requests of
household
furniture.

(*a*) Household furniture comprises everything that contributes to the use or convenience of the householder or the ornament of the house (*Kelly v. Ponlet*, Amb. 605). In that case books were held not to pass; but under a gift of the testator's furniture, and all his other articles of domestic use or ornament, books have been held to pass (*Cornwall v. Cornwall*, 12 Sim. 303). Where a testator devised his dwelling-house, garden, and premises to E. for her life, "and also all and singular the household furniture and other household effects" of and belonging to him in the said dwelling-house and premises at the time of his decease, not only books, but wines and liquors, turning-lathes and a sawing-machine, a stock of ivory and mahogany, and a pair of pistols, were held to be included (*Cole v. Fitzgerald*, 1 S. & S. 189), and V.-C. *Shadwell* was of opinion that a pony, cow and four fowling-pieces would pass if proved to be kept for the (use and) defence of the house, and that a haystack, if for use, would pass, but not if it were for sale (see the same case, on appeal, 3 Rus. 301). Books and wines were held to pass by a bequest of all the testator's "furniture, linen, plate, pictures, carriages, horses, and other

Prec. XVI.

and legacy
for her im-
mediate use.

Pecuniary

linen, china, glass, liquors, fuel and housekeeping stores, of which I shall die possessed, to my said wife absolutely; and I also bequeath to my said wife £ — for her immediate use, to be paid within ten days after my decease. I BEQUEATH to my

Bequests of
household
furniture.Words of
locality as
applied to
chattels.

Fixtures.

live and dead stock in his use and possession" (*Hutchinson v. Smith*, 1 N. R. 513, 11 W. R. 417.) In a bequest of all the furniture "except plate and pictures" in the testator's house at his death, it was held that the exception applied only to plate properly so called, and not to plated goods (*Holder v. Ramsbottom*, 4 Gif. 205). Under a bequest of all the goods and chattels whatsoever in and about testator's dwelling-house and outhouses at T. at his death, it was held that running-horses passed (*Countess Gower v. Earl Gower*, 2 Ed. 201). In *Lord Brooke v. Lord Warwick* (2 De G. & S. 425), telescopes were held to pass under the words "household furniture:" and under a bequest of the pictures and books which might be at testator's death in upon or about his mansion, it was held that pictures removed from the mansion to be cleaned, and books sent to be repaired, passed; but that articles purchased for the mansion, but not sent home at testator's death, did not pass. So also in *Pellew v. Horsford* (4 W. R. 442), an astronomical clock, which had been thirty years at a chronometer maker's, who had directions to sell it if a fair price could be obtained, passed under the specific bequest of testator's "household furniture." See also *Willis v. Curtois* (1 Be. 189); *Field v. Peckett* (29 Be. 573); *Domville v. Taylor* (2 N. R. 258, 11 W. R. 796). Where a testator bequeathed as follows: "all my interest in my house at L., the furniture, books, pictures, wines, &c., &c.," and after the date of his will removed from L., taking his furniture, &c. with him to S., where he afterwards purchased more of such articles, and subsequently died at S., it was held that the legatee was entitled to the furniture, books, pictures, wines and plate, which the testator had at his death (*Norris v. Norris*, 2 Col. 719; but see *Colleton v. Garth*, 6 Sim. 19; *Houlding v. Cross*, 1 Jur., N. S. 250). Words of locality thus placed in connexion with gifts of chattels often render it doubtful whether they are intended to restrict the gift to the chattels actually at the locality referred to; but a general gift of all in a certain locality "or elsewhere" will pass the general personal estate (*Re Scarborough*, 6 Jur., N. S. 1166, 9 W. R. 149). A gift of furniture in a particular house will not pass plate sometimes there used, sometimes elsewhere (*Wilkins v. Jodrell*, 11 W. R. 588). A bequest of "household furniture" will carry fixtures (*Paton v. Sheppard*, 10 Sim. 186), at all events such articles as are usually considered tenants' fixtures; but see *Slanning v. Style*, 3 P. W. 334; and *Allen v. Allen*, Mos. 112. See also Amos & Ferard, On Fixtures, 248, *et seq.* The cases on bequests of "household furniture," "household goods," and "household stuff" will be found collected in 1 Rep. Leg. 253, *et seq.* See also 1 Jarm. Wills, ch. 23; *Manning v. Purcell* (2 S. & G. 284, 7 D. M. & G. 55); *Tempest v. Tempest* (2 K. & J. 635).

Prec. XVI.

legacy to
brother.

brother [*name*] the sum of £ —, to be paid to him within six calendar months after my decease; and I direct that the same legacy shall not be deemed a satisfaction of the debt owing from me to him (*b*). I BEQUEATH the income of the

Income of

Debts, when
satisfied by
legacies.

(*b*) A gift by will *primâ facie* imports bounty; and yet, in spite of this seemingly obvious principle, it has been long an established doctrine, that where a person, who is under an obligation to pay a sum of money, bequeaths by his will to his creditor a pecuniary legacy equal to, or greater than, the amount of such debt, he is presumed to mean to discharge the obligation, and not to confer an additional benefit on the legatee, except, indeed, so far as the legacy may happen to exceed the debt (*Brown v. Dawson*, Pre. Ch. 240; *Talbott v. Duke of Shrewsbury*, ib. 394; *Fowler v. Fowler*, 3 P. W. 353; *Reach v. Kennegal*, 1 Ves. s. 123; *Bensusan v. Nehemias*, 4 De G. & S. 381). But a legacy of less amount is not a satisfaction even *pro tanto* (*Eastwood v. Vinke*, 2 P. W. 613); and it seems that, where there are several debts, a legacy equal to one of them will not satisfy such debt (*Graham v. Graham*, 1 Ves. s. 262); nor in any case will a debt be satisfied by a general or residuary bequest (*Barret v. Beckford*, 1 Ves. s. 519; *Devese v. Pontet*, 1 Cox, 118); nor *à fortiori*, by the gift of something entirely different. Thus, the gift of an estate or an annuity would not bar the right of the devisee or legatee to a pecuniary debt, or *vice versâ* (*Cranmer's case*, Salk. 508; *Broughton v. Errington*, 7 Br. P. 461; *Richardson v. Elphinstone*, 2 Ves. j. 463). It is clear, too, that a debt will not be satisfied by a legacy of equal or greater amount, payable expressly at a more distant period (*Nicholls v. Judson*, 2 Atk. 300; *Haynes v. Mico*, 1 Br. C. 129; *Adams v. Lavender*, M'C. & Y. 41); nor will a debt, absolutely payable, be satisfied by a legacy which is subject to a contingency (*Tolson v. Collins*, 4 Ves. 483); though *contra*, it seems, if a legacy originally contingent becomes absolute from circumstances occurring in the lifetime of the testator (*Mathews v. Mathews*, 2 Ves. s. 635; *sed qu.*). A very slight variation in the mode of payment, rendering the legacy less beneficial than the debt, is sufficient to rebut the presumption; such as the circumstance of the legacy being payable a month after the testator's death, and the debt *instante* (*Clark v. Sewell*, 3 Atk. 96); or (where the subject is an annuity) the circumstance of the bequeathed annuity having a later commencement than the annuity to which the legatee is entitled (*Richardson v. Elphinstone*, 2 Ves. j. 463); or of the former being payable half-yearly, and the latter quarterly; or of the former being subject to deductions from which the latter is exempt (*Atkinson v. Webb*, Pre. Ch. 236); nor is the effect of differences of this nature neutralized by any superiority in other respects, rendering the legacy upon the whole more valuable than the debt (*Lee v. Brown*, 4 Ves. 362). See also *Pinchin v. Simms* (30 Be. 119); *Charlton v. West* (ib. 124); *Smith v. Smith* (3 Gif. 263). In *Wathen v. Smith* (4 Mad. 325), it was held

Doctrine of
satisfaction
does not
apply; cases
where.

residue of the personal estate of which I shall die possessed to my said wife for her life, if she shall continue my widow ; And, on her

residue to
wife during
widowhood ;

that the presumption of satisfaction was not negatived by the circumstance of the legacy being payable at an earlier period than the debt ; but see *Cole v. Willard* (25 Be. 568) ; nor will the presumption be rebutted by the circumstance that the amount of the debt is liable to variation (*Edmunds v. Low*, 3 K. & J. 318).

Remarks on
the doctrine
of satisfaction
of debts.

The doctrine of satisfaction does not apply to a debt due upon a negotiable security, which may not be in the hands of the legatee (*Carr v. Eastbrooke*, 3 Ves. 561) ; nor to a debt constituted of the balance of a running account, the result of which may be unknown to the testator (*Rawlins v. Powel*, 1 P. W. 299) ; nor, under the old law, was it applicable to debts contracted after the making of the will (*Cranmer's case*, Salk. 508) ; nor where the will contains an express trust or direction for the payment of debts and legacies (*Chancey's case*, 1 P. W. 408 ; *Richardson v. Greese*, 3 Atk. 65 ; *Hassell v. Hawkins*, 4 Drew. 468 ; see also *Adams v. Lavender*, M'C. & Y. 41) ; though a direction to pay debts alone is not sufficient to rebut the presumption of satisfaction (*Edmunds v. Low*, 3 J. & K. 318). See also *Hawkins*, Constr. Wills, 299.

Where a testator directed his executors and trustees to pay his just debts, including the debts not paid in full proved under a commission of bankruptcy, it was held that such a direction must be regarded as bounty, not only in favour of the creditors who survived the testator, but of the representatives of those who predeceased him (*Re Sowerby's Trust*, 2 K. & J. 630 ; *S. C. nom. Turner v. Martin*, 7 D. M. & G. 429).

A post-obit covenant has been decided not to be a debt within the contemplation of a testator creating a trust for payment of debts (*Wathen v. Smith*, 4 Mad. 325 ; see also *Richardson v. Elphinstone*, 2 Ves. j. 463) ; a distinction which seems to be far from solid. It is certainly difficult to perceive the reasonableness of ascribing so much weight to a trust or direction to pay debts, as excluding the rule under consideration ; but to distinguish between post-obit and other obligations is to refine on a refinement, and multiply the petty distinctions which have long exposed the doctrine which is the subject of this note to the reprehension of every Judge whose attention has been drawn to it.

The Judges have, indeed, considered the rule as too firmly established to be broken through ; but they have for years steadily refused to push the doctrine one step further than their predecessors had gone, and have gladly availed themselves of any circumstances, however trifling, or discrepancies, however slight, between the debt and the thing given, in order to remove cases out of a rule which has been judicially characterized as a "false principle" (see 4 Drew. 470). The presumption of satisfaction is based upon the maxims *Debitor non presumitur donare*, and "Be just before you are generous : " but, as was remarked by Lord Chancellor King (*Chan- ceys case*, 1 P. W. 408), "When a man left such an estate and fund for

Prec. XVI.

—capital to
testator's

death or marriage, the capital, with the future income of such residue, to such child or children of mine, then living, and

his debts and legacies, as that he might thereout be both just and bountiful, in such case I do not see but it would be as reasonable that the whole legacy should take effect as a legacy, and that the debt should be paid besides."

Whether
servants'
claims for
wages are
satisfied by
legacies.

It is not quite clear whether debts owing to servants for wages are liable to be satisfied by legacies. In the case of *Richardson v. Greese* (3 Atk. 69), Lord *Hardwicke* observed, that legacies to servants had never been held to be in satisfaction of debts. No such exception, however, was suggested in *Chancey's case* (1 P. W. 408), where the legatee was a servant; but the case did not raise the point: and it is observable that Lord *Eldon*, in *Wallace v. Pomfret* (11 Ves. 546), where also the legatee was the testator's servant, chose to rest his decision in favour of the legatee upon other grounds. Where a particular motive is assigned for the gift, satisfaction of a debt will not be presumed (*Mathews v. Mathews*, 2 Ves. s. 635): and any mention of lengthened or meritorious services, or an expression of the testator's esteem for the legatee, would probably be held to be a sufficient assignment of motive to remove the case from the operation of the rule: but the question should be prevented from occurring, by an explicit declaration of the testator's intention that the legacy is to be in addition to the sum owing for wages.

See further respecting the satisfaction of debts by legacies, the notes to *Ex parte Pye*, *Talbott v. Duke of Shrewsbury*, and *Chancey's case*, in 2 Tud. L. C. Eq. 366, *et seq.*

Satisfaction
of portions
by legacies.

But though the leaning of the Courts is against the presumption of satisfaction of debts, there is, on the other hand, a leaning in favour of the presumption of the satisfaction of portions by legacies. Where a legacy from a parent, or person *in loco parentis*, is as great as, or greater than, the portion previously secured to the legatee, such legacy is presumed to be intended as a complete satisfaction (*Hinchcliffe v. Hinchcliffe*, 3 Ves. 516); and so strong is the inclination of equity against double portions, that if the legacy be smaller in amount than the previous provision, it is presumed to be a satisfaction *pro tanto* (*Warren v. Warren*, 1 Cox, 41), and slight differences between the previous settlement and the will are not sufficient to rebut the presumption (*Hinchcliffe v. Hinchcliffe*, 3 Ves. 516; *Sparkes v. Cator*, 3 Ves. 535; *Tolson v. Collins*, 4 Ves. 491; *Pole v. Somers*, 6 Ves. 319; *Savage v. Carroll*, 1 Ba. & Be. 276). A bequest of a residue or the part of a residue may be a satisfaction of a portion, either altogether or *pro tanto* according to the amount (*Lady Edward Thynne v. Earl of Glengall*, 2 H. L. C. 131; 12 Jur. 805). The question of satisfaction is one of intention (*Chichester v. Coventry*, L. R., 2 H. L. 71), and a direction in the will to pay the testator's debts is a material circumstance (*Paget v. Grenfell*, L. R., 6 Eq. 7).

A testator, on the marriage of his son, had covenanted to bequeath a

such issue, then living, of my child or children then deceased as shall, either before or after the death or marriage of my said

children and
issue living
at her death

sum not less than 2,500*l.*, to be held upon the trusts of the settlement; by his will he appointed 2,500*l.* out of a fund over which he had a special power of appointment in favour of his children, and to which his children were entitled in default, and he declared that such appointment should be taken in full discharge of the covenant; it was held that the appointment was not a satisfaction of the covenant, and that the covenant constituted a specialty debt of the testator for 2,500*l.* (*Graham v. Wickham*, 1 D. J. & S. 474).

See further as to satisfaction of portions by legacies, 2 Tnd. L. C. Eq. 354, *et seq.*; and as to the ademption of legacies by portions, *Ib.* 349, *et seq.* On the distinction between "satisfaction" and "ademption," see *Chichester v. Coventry*, *ubi sup.* A residuary bequest to a child may be adeemed by a subsequent gift of a portion, either entirely or *pro tanto*, in the same manner as a legacy of fixed amount (*Schofield v. Heap*, 27 Be. 93; *Beckton v. Barton*, *Ib.* 99); and questions of satisfaction and ademption stand upon the same principles, and must be governed by the same rules (*Montefiore v. Guedalla*, 1 D. F. & J. 93). See also *Dawson v. Dawson* (L. R., 4 Eq. 504); *Nevin v. Drysdale* (*ib.* 517).

Ademption
of legacies
by portions.

Analogous to cases of satisfaction previously considered, but distinct therefrom (see 1 P. W. 324, n., and 1 Sw. 220), are cases of performance of covenants to leave sums of money, or make other testamentary provisions, by allowing property to devolve by intestacy. The rule in this class of cases is, that where a person covenants to do a certain thing, and he does what is wholly or partially equivalent to the performance of his covenant, he shall be presumed to have so done with the intention of *pro tanto* performing his covenant. Thus A. covenanted on his marriage to purchase lands worth 200*l.* per annum, and settle them for the jointure of his wife, and to the first and other sons of the marriage in tail: he purchased the lands, but made no settlement, and on his death the lands descended to the eldest son; it was held that the lands descended were a satisfaction of the covenant (*Wilcocks v. Wilcocks*, 2 Ver. 558). Again A. covenanted, before marriage, to leave his intended wife 620*l.*: the marriage took place, and A. died intestate; the wife's share of his property amounted to more than 620*l.*, and this was held to be a satisfaction (*Blandy v. Widmore*, 1 P. W. 323). That covenants may be in this way executed in part, see *Lechmere v. Lord Carlisle* (3 P. W. 227); *Garthshore v. Chalie* (10 Ves. 1).

Performance
of covenants
and satisfac-
tion by in-
testacy.

But a gift by will of a residue will not, *per se*, be considered a performance of a covenant to leave a widow a certain sum (*Devese v. Pontet*, 1 Cox, 188). Where a husband covenanted to pay the interest of a sum of money to his widow for her life, this was held not to be satisfied by her distributive share on his intestacy (*Couch v. Stratton*, 4 Ves. 391). So also a covenant to leave an annuity to a widow is not performed by a dis-

Covenant not
satisfied by a
residue, or
distributive
share.

Prec. XVI.

or marriage
per stirpes;

—widowers
and widows
of deceased
children to
participate;

wife, attain the age of twenty-one years or marry [*or*, as being a male or males, shall, either before or after the death or marriage of my said wife, attain the age of twenty-one years, or, being a female or females, shall, either before or after the same period, attain that age or be married], as tenants in common, in a course of distribution according to the stocks and not to the number of individual objects, and so that the issue of deceased children may take as tenants in common, by way of substitution, the share or respective shares only which the parent or respective parents would, if living, have taken; But the widower or widow (if any) living at the period aforesaid, of every deceased child of mine, in the event of there not being any issue of the same child then living, shall be substituted for the same child as an object of the preceding trust, or, in the event of there being any such issue then living, shall take a life interest in the income of the share [*or*, be entitled to one (*third*) part of the share] which the deceased child would, if living, have taken, and also, on failure eventually of the interest, if contingent, of

tributive share devolving on the death of the husband intestate (*Salisbury v. Salisbury*, 6 Ha. 526).

As to a covenant by a father, upon the marriage of his daughter, that he would, either by act *inter vivos*, or by will, provide for his daughter, who however died in her father's lifetime, see *Jones v. How* (7 Ha. 267), in which case the Court of C. P. certified that the representative of the daughter had no good cause of action against the executors of the father, and the Equity Court concurred in the certificate. A sum of 600*l.*, to which a married woman was entitled for her separate use, was paid to her husband, who by his will gave her 2,800*l.*, and directed his executor to pay all his debts, and to take all the residue of his property; the husband died, the widow received the 2,800*l.* and executed a general release to the executor as to all matters under the will. The widow filed her bill for the payment of the 600*l.*: it was held that the 600*l.* existed as a debt, and that the legacy of 2,800*l.* was not intended to be in satisfaction of such debt; and that the widow was entitled to payment, notwithstanding the execution of the release (*Rome v. Rowe*, 2 De G. & S. 294).

Where the husband covenants to pay money in his lifetime, a distributive share is no satisfaction; in such a case there is an actual breach, not a performance, of the covenant, and a debt is due to the wife (*Oliver v. Brickland* or *Brighouse*, cited 1 Ves. s. 1, 3 Atk. 422, 10 Ves. 12).

See further as to performance of covenants and satisfaction by intestacy, the notes to *Wilcocks v. Wilcocks* and *Blandy v. Widmore*, in 2 Tud. L. C. Eq. 376, *et seq.*

Separate property of married woman paid to husband, a debt undischarged by legacy of larger sum; release by widow.

the issue in the capital of the same share [*or*, in the residue of the same share], be substituted for the deceased child as an object of the preceding trust. AND I EMPOWER my trustees, after the death or marriage of my said wife, to apply the whole or any part of the income of the contingent shares of the respective children and issue aforesaid, in or towards their respective maintenance or otherwise for their respective benefit; and I direct my trustees to accumulate, by means of the investments hereinafter authorized, the unapplied income, and add the accumulations to the capital of the respective shares whence the income shall have arisen. I ALSO EMPOWER my trustees to apply, after the death or marriage of my said wife, or during her widowhood with her consent in writing, any part, not exceeding a moiety, of the capital of the contingent shares of the respective children and issue aforesaid in or towards their respective advancement in life. I EMPOWER my trustees to permit my personal estate invested at my decease in or upon any stocks, funds, shares or securities whatsoever yielding interest, to continue in the same state of investment so long as they shall think fit; but, subject to such discretionary power, I direct them to get in my residuary personal estate not consisting of investments in or upon the public stocks or funds, or other Government securities of the United Kingdom, or real securities in England or Wales, or the bonds, debentures or debenture or guaranteed stock of any railway company in England, and to invest the proceeds in their names in or upon such stocks, funds or securities as last aforesaid, but not in or upon any other investments or securities. [*Or*, I EMPOWER my trustees at any time or times during the widowhood of my said wife, if they shall think fit so to do, and I direct them, after the death or marriage of my said wife, to convert or get in such part or parts of my residuary personal estate as shall not consist of investments in or upon stocks, funds or securities of the United Kingdom, or real securities in England or Wales, or the bonds, debentures, debenture or guaranteed stock of any railway company in England, and to place out in their names upon such investments as last aforesaid, and not in any other investment, the moneys to arise from the personal estate so converted or gotten in, which moneys and the investments thereof shall be subject to the trusts hereinbefore declared con-

—maintenance and advancement of children and issue.

Power to continue investments at interest—direction to get in and invest—power to vary investments;

—[*or*, discretionary power during widowhood of wife, and direction after death or marriage, to convert personal estate—trustees authorized to permit wife to receive the whole income of residue.]

cerning my residuary personal estate; AND I DECLARE that my trustees shall not incur any responsibility by permitting so much of my residuary personal estate as shall at my decease be constituted of lifehold or leasehold interests, or other determinable property (*c*), or be invested in or upon any stocks,

Suggestions
with respect
to trusts for
sale and con-
version.

(*c*) Devises and bequests in trust, which impose on the devisees and legatees the duty of converting the property (and almost every residuary disposition includes an express or implied trust of this nature to some extent), are often defective, in not giving to the trustees a discretionary power to postpone the conversion, and in omitting to dispose of the income in the meantime. An instance of the latter kind of omission occurs where a testator directs his real and personal estate to be sold, and the produce to be laid out in government or real security, of which the income is given to a person for life, with a gift over of the capital. According to the literal terms of the will, the legatees take nothing until the sale, which might be deferred, either from circumstances inevitably preventing it, or from the negligence of the trustees, for a considerable period. Such an extended postponement of the legatee's interest clearly is not meant. In comparison with such a scheme, an approach to the intention would probably be made, by permitting the legatee for life to take the income of the property while unsold; but this is unauthorized by the words of the will, for they give only the income of the fund constituted of the proceeds, which obviously might yield a very different amount. For instance, supposing part of the residue to consist of leaseholds, held for a short term of years;—to defer the sale and pay over the rents to the legatee for life, would place an undue advantage in his hands, at the expense of the ulterior legatees: while, on the other hand, if the subject-matter were a reversion, the delay in the conversion of the property would be no less unfairly advantageous to those legatees. Equal justice to these respective parties seems to require that some period should be fixed (irrespective not only of the greater or less degree of activity of the trustees in effecting a sale, but also, even of circumstances which might, probably or necessarily, delay and impede it), at which the property shall for this purpose be considered as sold, and the parties placed, so far as may be practicable, in the same situation as if the sale had then taken place; or, in other words, that there should be a period of constructive conversion, distinct from and independent of the actual conversion. And this we shall find has been effected, not only where the income accruing before the sale or conversion of the property is undisposed of, but also where the intermediate income is expressly directed to be accumulated; for, even in the latter case, it is not to be supposed that the testator intended that the beneficial interests of the legatees should be subject to all the accidents by which the sale is liable to be deferred.

The following positions exhibit the doctrine of the cases:—*First*. In

funds, securities or other pecuniary investments whatsoever, whether foreign or British, real or personal, permanent or de-

the ordinary case of residuary property being directed to be sold or otherwise converted into money, and the produce (either with or without a prior express trust for payment of debts and legacies) laid out in government or real security, for the benefit of a person for life, at whose decease the capital is given to other persons, without any direction to accumulate the profits accruing before the conversion, the income arising from such part of the residue as at the time of the testator's decease was invested in government or real securities (being securities of the same nature as those which are directed to be purchased) belongs to the residuary legatee for life from the period of the testator's decease (*Hewitt v. Morris*, T. & R. 241; *Angerstein v. Martin*, Id. 232; *Dimes v. Scott*, 4 Rus. 195; *La Terriere v. Bulmer*, 2 Sim. 18; *Douglas v. Congreve*, 1 Ke. 410; *Caldecott v. Caldecott*, 1 Y. & C. 737; and see *Bulkeley v. Stephens*, 3 N. R. 105). Secondly. In the case last described, the destination of the income arising within the year from such part of the residue as falls within the scope of the converting trust (the same not being composed of or invested upon securities such as the will requires) is more doubtful: it is now settled that the tenant for life is entitled from the death of the testator (*Macpherson v. Macpherson*, 1 Macq. 243, 16 Jur. 847), but the difficulty still remains in what manner is he to have the benefit of the rule as between himself and those entitled in remainder? In *La Terriere v. Bulmer* (2 Sim. 18), it is true Sir A. Hart, V.-C., thought that such income as we are now considering formed part of the capital, but on this point that case is no longer an authority. In *Douglas v. Congreve* (1 Ke. 410), Lord Langdale, M. R., held the legatee for life to be entitled to the actual income arising from unconverted funds from the testator's death until the end of the year, or until conversion, which should first happen. See also *Angerstein v. Martin* (T. & R. 232); *Scholefield v. Redfern* (11 W. R. 453). But the true principle seems to be that, with respect to that part of the residue which at the testator's death is not invested in securities of the same kind as those directed to be purchased, the tenant for life, during the first year after testator's death, is entitled to so much income as the property would have produced if invested according to the will. Thus in *Dimes v. Scott* (4 Rus. 209), Lord Lyndhurst held the legatee for life entitled, in lieu of the actual annual income, to dividends on so much Three per Cent. Stock as the proceeds of the property, if converted, would have purchased at the end of the year; and the same rule was followed by Sir J. Wigram, V.-C., in *Taylor v. Clark* (1 Ha. 161), and by Sir J. Romilly, M. R., in *Morgan v. Morgan* (14 Be. 72); *Holgate v. Jennings* (24 Be. 623); and *Re Llewellyn's Trust* (29 Be. 171). Thirdly. Where trustees are directed to convert the property, and, until the conversion, the income is to be added to the capital, and the conversion is deferred beyond the period of a year from the testator's decease, the process of accumulation ceases, and the title of the legatee

Trusts for conversion. Rules deduced from the cases.

Prec. XVI.

terminable, to remain wholly or in part so invested, or by permitting my said wife to receive the whole amount of the yearly

Trusts for conversion.
Rules deduced from the cases.

for life to the income commences, at the end of such year from the testator's decease, this being considered to afford a reasonable time for the conversion of the property (*Sitwell v. Bernard*, 6 Ves. 520, and the cases there cited; *Kilvington v. Gray*, 2 S. & S. 396; *Vicars v. Scott*, 3 M. & K. 500; *Tucker v. Boswell*, 5 Be. 607). *Fourthly*. With respect to such portion of the property as is converted before the end of the year following the testator's decease, the legatee for life takes the actual income of the fund constituted of the proceeds from the time of its investment, and that too without regard to the fact whether there was or was not a trust to accumulate the profits until conversion (*La Terriere v. Bulmer*, 2 Sim. 18; see also *Dimes v. Scott*, 4 Rus. 209). *Fifthly*. If the property is not actually converted at the end of a year from the testator's decease, it must be computed what would have been the result if the conversion had then taken place, and the produce had been invested in Three per Cent. Stock (supposing the trust to be to invest on government or real security), the dividends of which stock will form the whole income to which the legatee for life will be entitled (*Robinson v. Robinson*, 11 Be. 371; 1 D. M. & G. 247), either from the testator's decease or from the end of a year, according to the fact whether there is not or is a trust for accumulation. And this rule applies as well where the fund or property is of a permanent nature, as where it is terminable and temporary, as leaseholds, long annuities, &c. (See *Dimes v. Scott*, 4 Rus. 209; *Mills v. Mills*, 7 Sim. 501).

Remarks upon *Dimes v. Scott*.

The principle of distribution established by the case of *Dimes v. Scott* would, it is conceived, apply, even where the residuary clause contained no express trust for conversion, with respect to property of a limited duration, such as leaseholds for short terms, terminable annuities, &c., the income arising from which ought, from the period of the testator's decease, to be carried to account as capital; and in lieu of such income the executors should pay to the legatee for life, from the testator's decease, such sum as the dividends on Three per Cent. Stock, purchased with the actual produce of the sale, would amount to, in case the sale take place within a year from the testator's death; and if not, then such sum as would be equal to the dividends arising from the investment of the proceeds of the sale, in case the same had been made at the year's end, together, in either case, with dividends on the interim income of the terminable unconverted property (*Fearn v. Young*, 9 Ves. 549; *Howe v. Earl of Dartmouth*, 7 Ves. 137; *Mills v. Mills*, 7 Sim. 501; but see *Crawley v. Crawley*, 7 Sim. 427, and *Sutherland v. Cooke*, 1 Col. 503, where interest at four per cent. was allowed to the tenant for life). With respect to that part of a residue not expressly directed to be sold, which is undergoing no diminution by lapse of time, and is invested on permanent real securities, it is clear that the doctrine in question would not apply, but that the executor would be warranted in paying to the residuary legatee for life the income of the property, accord-

Question whether legatee for life is entitled in specie.

produce thereof during her widowhood, or by permitting so much of my residuary personal estate as shall not be so consti-

ing to its actual state (*Mills v. Mills*, 7 Sim. 501; and see *Howe v. Earl of Dartmouth*, 7 Ves. 137; and *Morgan v. Morgan*, 14 Be. 72). And even in regard to decaying property, the doctrine which requires its conversion, and an investment of the proceeds in a permanent fund, will, of course, yield to expressions, showing that the testator meant to give the legatee for life the actual income, according to the existing state of the property. Thus, where a testatrix, who was possessed of Long Annuities and no other stock, bequeathed certain annual sums to be paid out of her "funded property," and then gave to A. the whole of the remainder of her dividends during her natural life, and at the death of A., the testatrix gave sums of stock to various persons, using in such bequests terms applicable not to Long Annuities, but rather to capital, as "1000*l.* stock," &c., the ulterior legatees claimed to have the Long Annuities converted into Three per Cent. Annuities, on the ground that, as the Long Annuities were a decreasing fund, the ulterior legatees might by the progress of such decrease be disappointed of their legacies; but Lord *Lyndhurst* decided, that A. was entitled to the residue of the Long Annuities during her life, under the words "the whole of the remainder of my dividends" (*Vincent v. Newcome*, 1 You. 599). So where a testator willed that his wife should "receive the interest of all the property he possessed in the public funds," (there was no gift in remainder), it was held, that the wife was entitled to receive the income of all the property which the testator had in the funds at the date of his will, and in its then state of investment, although it consisted of Long Annuities (*Cockran v. Cockran*, 14 Sim. 248): see also *Boys v. Boys* (28 Be. 436); *Re Elmore's Will* (9 W. R. 66). *A fortiori*, are trustees not justified in converting into a permanent stock, Long Annuities which are specifically bequeathed in trust for a person for life, and then to other persons absolutely (*Lord v. Godfrey*, 4 Mad. 455); as to Long Annuities and Bank Stock, see *Neville v. Lord Fortescue* (16 Sim. 333); *Hubbard v. Young* (10 Be. 203). See also the cases collected in *Goodenough v. Tremanondo* (2 Be. 515, n.); as to leaseholds, *Hind v. Selby* (22 Be. 373). In some recent cases even a residuary legatee for life has been held to be entitled to the income of property of a wasting nature, the ulterior subject of gift and the intermediate interest of the cestui que trust for life being respectively described in terms applicable to the actual condition of the property; thus in *Alcock v. Slopers* (2 M. & K. 699), where a testator devised and bequeathed all the residue of his estate and effects to his executors, upon trust to permit his wife to receive the rents, profits, dividends and annual proceeds thereof for her sole use, her own receipt to be a sufficient discharge for the rents and dividends; and after her decease, upon trust to sell his freehold house in O., and his leasehold houses, by auction; and it was his desire that A. should be employed as auctioneer to convert the whole of his estate and effects into

Perishable property.

Residuary legatee for life held to be entitled to actual income.

— tuted or invested to remain unconverted, or by permitting my said wife to have the use or enjoyment thereof during her

Enjoyment
in specie by
legatee for
life.

money, and distribute the same in the manner mentioned in the will: part of the residuary estate consisted of Long Annuities, and the question was whether the wife was entitled to the annual proceeds of the wasting fund. Sir *J. Leach*, M. R., decided in the affirmative, there being no intimation of an intention that any part of the property should be immediately converted by the trustees, who were to be merely passive; he considered that the term "dividends" had reference to the Long Annuities; and his Honour adverted to the fact that the leasehold property, also a wasting fund, was expressly to be sold after the wife's decease, which showed that he had no general notion of immediately converting the wasting portion of his residuary estate into permanent property. In *Collins v. Collins* (2 M. & K. 703), the same Judge arrived at a similar conclusion on a will in which the indication of intention was less decisive and unequivocal, the words of the bequest being, "I give to my wife J. all and every part of my property, in every shape and without any reserve, and in whatever manner it is situated, for her natural life; and at her death the property so left to be divided in the following manner." Part of the testator's property consisted of a leasehold messuage, held for a term of twenty-eight years; and Sir *J. Leach*, M. R., considered that the ulterior legatees were not entitled to have the lease sold; but that it was the intention of the testator that his widow should enjoy the leasehold property for her life. So, in *Pickering v. Pickering* (2 Be. 31), where a testator gave to his wife all the interest, rents, dividends, annual produce and profits, use and enjoyment, of all his estate and effects whatsoever, real and personal, for the term of her natural life, subject to certain annual payments; and, at the decease of his said wife, the testator gave, devised and bequeathed to A. all the rest and residue of his estate and effects whatsoever, both real and personal, to hold to him, his heirs, executors, administrators and assigns, for ever: Lord *Langdale*, M. R., and afterwards Lord *Cottenham* (4 M. & C. 289), held that the widow was entitled to the enjoyment of the property *in specie*. And in *Harvey v. Harvey* (5 Be. 134), Lord *Langdale* came to the same conclusion on a will which gave to the widow "the full and entire" enjoyment of his real and personal estate. See also *Wrey v. Smith* (14 Sim. 202); *Burton v. Mount* (2 De G. & S. 383); *Hinves v. Hinves* (3 Ha. 609); *Hunt v. Scott* (1 De G. & S. 219); *Skirving v. Williams* (24 Be. 275); *Rowe v. Rowe* (29 Be. 276); *Vachell v. Roberts* (32 Be. 140). Another instance of the same kind (though here none of the property seems to have been of a wasting nature) is afforded by the case of *Sparling v. Parker* (9 Be. 524), where a testator, after directing an investment of all his moneys, and the amount of all such mortgages, &c., as might be immediately sold without disadvantage, to be invested in the purchase of lands, gave the interest, rents and profits accruing from every part of his real and personal estate until converted into real property unto

widowhood]. I EMPOWER my trustees to vary from time to time the investment of my residuary personal estate,

Power to change investments—

E. for life: Lord *Langdale*, M. R., held that E. was entitled to the actual income of mortgages and shares from the death of the testator until conversion. But in *Benn v. Dixon* (10 Sim. 636), where a testator gave to his wife the whole of the interest arising from his property, both real and personal, during her life; and in case he should die without issue, he gave, after the death of his wife, the whole of his property, both real and personal, to his brothers and sister; the testator died possessed of leasehold, and also of real property: Sir *L. Shadwell*, V.-C. E., held that the widow was not entitled to the leasehold property *in specie* during her life, but only to the dividends of stock to be purchased with the proceeds of the sale of it, there being, he said, nothing on the face of the will to prevent the application of the rule that perishable property must be sold and converted into money and invested in the funds. Again, in *Pickup v. Atkinson* (4 Ha. 624), where a testator, after a specific gift of certain leasehold houses to his wife for her life, she paying the ground rents and performing the covenants, with remainder over to his nephew, bequeathed the "rents and profits, dividends and interest," of all the residue of his property to his wife for her life, with a gift over of the whole of the residue after her decease to other persons; Sir *J. Wigram*, V.-C., held that the widow was not entitled to the enjoyment *in specie* during her life of that part of the residue which consisted of leasehold and other perishable property, but that the same ought to be converted. See also *Chambers v. Chambers* (15 Sim. 183); *Johnson v. Johnson* (2 Col. 441).

Enjoyment *in specie* by legatee for life.

In the application of the rule for conversion, at the testator's death, into permanent investments, of perishable or wasting property in which he has given interests for life and other interests in succession, the leaning of the Courts, in the later cases, has been in favour, when the meaning was doubtful, of that construction which would give to the tenant for life the enjoyment of the property *in specie*.

In recent doubtful cases, tendency in favour of life tenant.

The point, however, is frequently embarrassed by the fact, that the testator has thrown into the general residuary bequest a specification of certain species of property; thereby raising the question, whether the bequest is not, as to such specified property, to be considered as a specific gift; as in *Bethune v. Kennedy* (1 M. & C. 114), and *Vaughan v. Buck* (1 Ph. 75), where the persons to whom the residuary personal estate was bequeathed for life, were held to be entitled to the enjoyment *in specie* of certain enumerated particulars, forming part of the residue. See also *Grant v. Mussett* (8 W. R. 330); and *ante*, pp. 125, 126.

Bequests, specific or residuary.

It may be observed, that the mere fact of the testator having expressly directed the sale and conversion of a portion of his residuary property is not sufficient of itself to take the rest of the property out of the general rule, and entitle the tenant for life to an enjoyment *in specie* (*Cafe v. Bent*, 5 Ha. 34).

Prec. XVI.

wife's consent made necessary.

The actual produce of investments to be deemed income.

Devise of mortgage and trust estates.

Trustees' receipts to be discharges.

Power to appoint trustees, &c.

limiting them to such stocks, funds and securities as last aforesaid; but I restrain my trustees from exercising, during the widowhood of my said wife, the aforesaid powers relative to the continuing and varying of investments, without her previous consent in writing. I DECLARE that the actual yearly produce of my residuary personal estate, whether consisting of investments to be made by my trustees as aforesaid, or of investments of whatever nature to be continued by them as aforesaid, shall be deemed the income of such personal estate for the purposes of my will. I DEVISE to my said trustees [*names*] all the real estates (if any) which shall at my decease be vested in me as a trustee or mortgagee, subject to the equities affecting the same respectively. I EMPOWER my trustees to give receipts for all moneys and effects to be paid or delivered to them by virtue of my will, and declare that such receipts shall exonerate the persons taking the same from all liability to see to the application or disposition of the moneys or effects therein mentioned. I DECLARE that if my said trustees, [or any] or either of them, shall die in my lifetime, or if they [or any] or either of them, or any person or persons to be appointed under this

Actual income until conversion should be expressly given.

Discretion as to period of conversion.

In order to prevent questions of this nature, and to relieve executors and trustees from the onerous task of entering into the complex calculations which the doctrine of some of the cases would require, every will ought to contain a direction entitling the beneficial legatee for life to the actual income of the property, whether derived from temporary or permanent sources; thereby reconciling the legal duty with the ordinary conduct of executors and trustees, and giving effect to the intention of the testators, which, there can be little doubt, is commonly defeated by applying the principle of *Dimes v. Scott* (*ante*, p. 247). In general, too, trustees who are directed to sell ought to be expressly invested with a discretion as to the period of sale, for which it seems slight expressions will suffice (*Walker v. Shore*, 19 Ves. 387). Where there has been no undue delay on the part of the trustees in converting the property, and the will contains a clause entitling the tenant for life to the actual income, no allowance is made to him for any portion of the estate which is unproductive (*Mackie v. Mackie*, 5 Ha. 70).

See further, on the conversion of residue bequeathed to persons in succession, *Howe v. Lord Dartmouth*, and the notes thereto, in 2 Tud. L. C. Eq. 289; and on a power to convert personalty into realty, *De Beauvoir v. De Beauvoir* (3 H. L. C. 524). See also *Johnston v. Moore* (6 W. R. 490); *Stroud v. Gwyer* (28 Be. 130), cases relating to partnership property.

clause, shall, after my death, die or disclaim, or be unwilling, incompetent or unfit to execute the trusts of my will, or desire to retire from the office, it shall be lawful for my wife during her widowhood, and after her death or marriage for the competent trustees or trustee for the time being (if any), whether refusing or retiring from the office of trustee or not, or, if none, for the acting executors or executor for the time being, or the administrators or administrator for the time being of the last surviving trustee, to substitute, by any writing under her, his or their hand or hands, any fit person or persons, in whom alone, or, as the case may be, jointly with the surviving or continuing trustees or trustee, my trust estates shall vest, or by proper acts or assurances be vested (*d*); and that the trustees or trustee for the time being of my will shall be competent to exercise the powers and discretions given to the trustees herein named. LASTLY, I revoke all former wills. IN WITNESS, &c.

(*d*) See *ante*, p. 129, as to dispensing wholly or partially with the usual clause appointing new trustees. This and several similar powers in the text (*ante*, pp. 173, 237) are nearly as concise as the form required when the statutory power is used (*ante*, pp. 129, 164), and this being so, the practice of inserting the power in full is to be preserved. It would seem to be the true principle that the statutory powers generally should be relied upon only in those cases in which they can be adopted in their entirety.

No. XVII.

WILL of a WIDOWER, disposing of Real and Personal Property in favour of his Children, with ulterior Trusts in favour of other Objects.—Real and Personal Estate vested in Trustees for Sale and Conversion; Produce to be invested, and Fund divided among the Children equally, with Provisions for Maintenance and Advancement; but a Moiety of each Child's Share is settled upon Trusts for the Child and its Issue, adapting the Trusts to the Sex of the Child, and with a special Provision for protecting the Life Interests of Daughters.—Powers to let and manage Real Estate, compound Debts, appoint Trustees, &c.—Appointment of Executors, with Legacies for their Trouble.

THIS IS THE LAST WILL AND TESTAMENT of me, [*testator's name, residence and quality*]. I DEVISE all the real estates which shall at my decease be vested in me as mortgagee or trustee in fee unto [*names, &c.*], upon such trusts and subject to such equities as shall at my decease be subsisting concerning the same respectively. I DEVISE my farm and lands situate in the parish of —, in the county of —, partly in my own occupation, and partly in the occupation of [*tenant*], with their actual and reputed appurtenances, to my eldest son [*name*], his heirs and assigns, he or they paying, in exoneration of my other estate, the principal sum now owing upon mortgage of the said devised estate, and any other incumbrances (except the arrears of interest on any mortgage debt) which at the time of my decease shall affect the same (*a*). I DEVISE all other the real

Devise of mortgage and trust estates to trustees.

Devise of specific lands in fee.

General devise of other

As to the exoneration of devised estates in mortgage.

(*a*) Previously to the 17 & 18 Vict. c. 113, the heir-at-law or devisee of mortgaged real estate, in accordance with the general rule that a testator's personalty is the primary fund for the payment of his debts, unless expressly or by clear implication exempted therefrom, was entitled to have the land exonerated from the mortgage, and might require that the charge should be satisfied out of the general personal estate of the testator, unless

estate, and bequeath all the personal estate, which shall belong to me at my decease, to the said [*trustees*], UPON TRUST to sell

real estates
and bequest
of personal

in the case of a devise, it was manifest from the will that the devisee was intended to take the estate, subject to the charge. The liability of the general personal estate was unquestionable, where the mortgage was created by the testator himself: and a devise of an estate, subject to the mortgage thereon, did not exonerate the personalty, those words being considered as a description of the state of the property (2 Jarm. Wills, 598; *Goodwin v. Lee*, 1 K. & J. 377; *Newhouse v. Smith*, 2 S. & G. 344).

17 & 18 Vict.
c. 113, *Locke*
King's Act.

But where the property was purchased by, or otherwise devolved upon, the testator, subject to the incumbrance, the right to exoneration depended upon whether the testator could be considered to have adopted the debt as his own, so as to render his own personalty the primary fund for its liquidation—a point often difficult to be ascertained. In such cases, therefore, it was important that the testator's intention on the point should be clearly expressed. Of course the old law still applies to cases not within the new Act, the provisions of which (not extending to Scotland) are as follows:—

“When any person shall, after the thirty-first day of December, 1854, die seised of or entitled to any estate or interest in any land or other hereditaments which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not, by his will or deed, or other document, have signified any contrary or other intention, the heir or devisee to whom such land or hereditaments shall descend or be devised shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate or any other real estate of such person, but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof: provided always, that nothing herein contained shall affect or diminish any right of the mortgagee on such lands or hereditaments to obtain full payment or satisfaction of his mortgage debt either out of the personal estate of the person so dying as aforesaid or otherwise: provided also, that nothing herein contained shall affect the rights of any person claiming under or by virtue of any will, deed or document, already made or to be made before the first day of January, 1855.”

Testator
dying after
31 Dec. 1854.

Mortgaged
land pri-
marily liable
to payment
of mortgage.

Proviso as
to rights of
mortgagee,

and persons
claiming
under will,
&c. made
before 1855.

A lien for unpaid purchase-money was not a charge by way of mortgage within this Act (*Hood v. Hood*, 5 W. R. 747; 26 L. J., Ch. 616; *Barnwell v. Iremonger*, 1 Dr. & S. 260). But by 30 & 31 Vict. c. 69, s. 2, the word “mortgage” is made, in the construction of the Act, to extend to such a lien. A sum of money having been raised by a testator on a legal mortgage of one estate, with an equitable mortgage of another estate, as collateral security for part of the debt, it was held that in administration

30 & 31 Vict.
c. 69, s. 2.

Pr. XVII.

estate to
trustees,
upon trust

and convert into money my said real and personal estate, when
and as the trustees or trustee for the time being of my will

*Locke King's
Act.*

Copyholds.

the estate subject to the legal mortgage was primarily liable to the whole debt (*Stringer v. Harper*, 26 Be. 33). Copyholds are within the Act (*Piper v. Piper*, 1 J. & H. 91). An heir-at-law of a testator, taking by descent an estate which has been the subject of a lapsed devise in the will, is not a person claiming "under or by virtue of any will" within the meaning of the proviso (*Nelson v. Page*, L. R., 7 Eq. 25); and the proviso does not apply to the case of a person claiming as heir whose ancestor acquired the property by a "deed or document" executed before 1855 (*Piper v. Piper*, *ubi sup.*); nor does it save a right to the heir to be exonerated from a mortgage debt out of personalty bequeathed by a will made before 1855: thus in 1834 A. made his will, devising and bequeathing all his real and personal estate to B., and appointing C. his executor; after the date of the will, A. mortgaged part of the realty, and for the purpose of securing the sum advanced he executed a disentailing deed, which revoked the will as to realty; A. died in 1856: it was held that the 17 & 18 Vict. c. 113 applied, and that the heir was not entitled as against B. to be exonerated from the mortgage (*Power v. Power*, 8 Ir. Ch. Rep. 340). But where a testator, by a will made in 1847, devised an estate which was in mortgage, and in 1861 made a second will which did not affect the claim of the devisee, it was held that the devisee, claiming solely under the will of 1847, was within the proviso, and was entitled to have the mortgage paid out of the personal estate (*Rolfe v. Perry*, 2 N. R. 97; 9 Jur., N. S. 491).

Leaseholds.

The words "any estate or interest in land" are clearly sufficient to include leaseholds for years, but, on the other hand, the Act proceeds to say that "the heir or devisee to whom such land shall descend or be devised shall not be entitled," &c.: the word "heir" cannot apply to leaseholds for years, which are personal property, and the word "devise" properly refers to real estate. Accordingly it was held in *Solomon v. Solomon* (12 W. R. 540) that leaseholds are not within the Act.

Where freeholds and leaseholds are comprised in the same mortgage, and the mortgagor dies intestate, the mortgage debt, as between the heir and the administrator, is borne rateably by the freeholds and leaseholds (*Evans v. Wyatt*, 31 Be. 217).

Equitable
mortgage.

An equitable mortgage of freeholds, by deposit of deeds and memorandum, is within the Act (*Pembroke v. Friend*, 1 J. & H. 132; *Coleby v. Coleby*, L. R., 2 Eq. 803, where the deposit was a collateral security for a sum borrowed on promissory note).

Notwithstanding the words "as between the different persons claiming through or under the deceased," the Act applies in favour of the Crown, claiming personalty for want of next of kin (*Dacre v. Patrickson*, 1 Dr. & S. 186).

The Act applies only where there is a defined and specified charge on a specified estate (*Hepworth v. Hill*, 30 Be. 476).

shall, in their or his discretion, deem it most advantageous so to do; with power to make any special or other conditions of

to sell and
get in, &c.;

It is impossible to lay down a general rule as to what is a sufficient signification by a testator of an intention to exclude the operation of the Act; in each case the intention must be gathered from the whole will (*Rolfe v. Perry*, 2 N. R. 97). Where of two estates comprised in the same mortgage, the testator devised one specifically, and left the other to pass by a residuary devise, the latter estate was held primarily liable to the whole of the mortgage debt (*Brownson v. Lawrance*, L. R., 6 Eq. 1). In *Greated v. Greated* (26 Be. 621), where a gift of residue was in these terms: "The rest and residue of my real and personal estate, after paying my mortgage and other debts and funeral expenses, I leave, &c.," it was held that this was a sufficient indication of intention that the mortgage debts were to be paid from another source than the mortgaged estate. See also *Allen v. Allen* (30 Be. 395). In *Stone v. Parker* (1 Dr. & S. 212), it was held that a declaration that trustees should stand possessed of residuary real and personal estate, subject in the first place to the payment of debts, was sufficient to prevent the applicability of the Act; see also *Newman v. Wilson* (31 Be. 33). In *Woolstencroft v. Woolstencroft* (2 Gif. 192), a direction by the testator that all his debts should be paid by his executors out of his estate was held to exonerate realty from a mortgage debt, but this decision was reversed on appeal (2 D. F. & J. 347). See also *Brownson v. Lawrance* (L. R., 6 Eq. 1). In *Smith v. Smith* (3 Gif. 263), where the words were, "out of the moneys to arise from the conversion of my personal estate and effects, to pay my funeral and testamentary expenses and debts and legacies," and where the devisee of the mortgaged estate was one of the executors, it was considered that the devise to one of the executors distinguished the case from *Woolstencroft v. Woolstencroft*, and it was held sufficient evidence of a contrary intention that the testator had directed the devisee of the estate and two other persons to pay the debt out of his personalty. In *Mellish v. Vallins* (2 J. & H. 194), a bequest of personalty, "subject to the payment thereof of all testator's just debts," following a devise of land in mortgage, but which contained no reference to the mortgage, was held a sufficient indication that the land should not be primarily liable to the payment of the mortgage debt; see also *Smith v. Smith* (10 Ir. Ch. Rep. 89, 461). A direction that "all just debts be paid as soon as may be," followed by a devise in fee, does not exclude the operation of the statute (*Pembroke v. Friend*, 1 J. & H. 132). In *Rowson v. Harrison* (31 Be. 207), a direction that all just debts should be paid by the executors out of the personal estate, was by the Master of the Rolls held insufficient to exonerate a mortgaged estate from the mortgage debt; and similarly, in *Moore v. Moore* (10 W. R. 877), a bequest of residuary personal estate to trustees upon trust to sell, and thereout in the first place pay all just debts, funeral and testamentary expenses, and after payment thereof to hold the residue upon the trusts therein mentioned, was, by the

17 & 18 Vict.
c. 113.

"Contrary
intention"
to exclude
the Act.

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sale as to the title or the evidence of title, or otherwise, and with power to buy in the premises at any sale by public auction, and to rescind or vary, either on terms or gratuitously, any contract for sale, and to resell the premises without being answerable for any consequent loss; and to execute and do all assurances and acts which may be necessary for vesting the premises so sold in the purchasers thereof respectively; And I declare, that in the meantime and until the sale thereof respectively, such real and personal estate, and the rents,

17 & 18 Vict.
c. 113.

same learned Judge, held not to be sufficient evidence of "contrary intention" within the meaning of the Act. The conflict of decisions between the two last-mentioned cases and *Mellish v. Vallins*, was brought under the notice of the Court of Appeal in *Eno v. Tatam* (1 N. R. 29; 9 Jur., N. S. 481); in that case the testator appointed his wife sole executrix, and bequeathed his personal estate to her, subject to the payment of his debts, funeral and testamentary expenses; he then devised his real estate, part of which was subject to a mortgage, upon trusts not pointing to the payment thereof of the mortgage debt; and it was held that this was a sufficient indication of an intention that the real estate should not be primarily liable to the payment of the mortgage debt. The Lord Justice *Turner*, in affirming the decision of *V.-C. Stuart* (4 Gif. 181), made some observations upon the *dictum* of Lord *Campbell* in *Woolstencroft v. Woolstencroft*, and expressed his approval of the cases in which it had been held that the mortgaged estate was not primarily liable where there was a direction that the debts of the testator should be paid from some other source. The Lords Justices have since reversed the Master of the Rolls' decision in *Moore v. Moore* (1 D. J. & S. 602); and see *Rodhouse v. Mold* (6 N. R. 287); *Maxwell v. Hyslop* (L. R., 4 Eq. 407).

30 & 31 Vict.
c. 69, s. 1.

By 30 & 31 Vict. c. 69, s. 1, it is enacted that in the construction of the will of any person who may die after 31st December, 1867, a general direction that the debts or that all the debts of the testator shall be paid out of his personal estate, shall not be deemed to be a declaration of an intention contrary to or other than the rule established by 17 & 18 Vict. c. 113, unless such contrary or other intention shall be fully declared by words expressly or by necessary implication referring to all or some of the testator's debts or debt charged by way of mortgage on any part of his real estate. The meaning of which appears to be this—that if a testator wishes to exclude the rule laid down by *Locke King's Act*, he must give a direction applying to his mortgage debts in such terms as distinctly and unmistakeably to refer to or describe them (*Nelson v. Page*, L. R., 7 Eq. 25).

See further, as to the exoneration of mortgaged estates, the notes to *Duke of Ancaster v. Mayer* (1 Wh. & Tud. L. C. Eq. 564; and 2 Jarm. Wills, 595, 610; Williams, Real Assets, 37, 134; Hawkins, Constr. Wills, 278; 4 Dav. Conv. by Waley, 257, n. (e)).

interests and yearly produce thereof respectively, shall be subject to the trusts and provisions hereinafter contained concerning the money to arise therefrom, and concerning the income of such money; And that such real estate shall be considered as converted in equity from the time of my decease for the purposes of such trusts and provisions; AND I DIRECT my trustees or trustee for the time being to invest the money to arise from the real and personal estate to be sold and gotten in as aforesaid, in the names or name of the said trustees or trustee, in or upon any of the public stocks, funds or securities of the United Kingdom, or on mortgage of freehold, copyhold or leasehold estates in England or Wales, and not elsewhere, or upon the bonds, debentures or debenture stock of any railway, canal or dock company in England, authorized by special Act of Parliament, and at the times of the investments thereon respectively paying dividends (but not in or upon any other investments), with liberty to vary and transpose the investments from time to time, at the discretion of the said trustees or trustee, for any other investment or investments of the description contemplated by this trust; And as to the money to arise as aforesaid, and the stocks, funds and securities whereon the same shall be invested, (which moneys, stocks, funds and securities are hereinafter designated "my trust fund"), my said trustees or trustee shall stand possessed thereof, IN TRUST for my child, if only one, wholly, or for my children, if more than one, in equal shares; But if any of them shall die under the age of twenty-one years without having married [*or*, if any of them, being a son or sons, shall die under the age of twenty-one years, or, being a daughter or daughters, shall die under that age without having been married, *or*, if any of them shall die under the age of twenty-one years without leaving issue (*or*, without leaving a husband, or widow, or issue) living at his or her decease], then IN TRUST, as to as well the share originally limited under the preceding trust, as the shares eventually limited under this executory trust, to any and every child so dying, for the others and other (*b*) of my children, and if more

—unsold real estate to be deemed personal;

—to invest produce of real and personal estate, with power to vary investments;

—for testator's children equally, with benefit of accruer;

[—different periods of absolute vesting;]

(*b*) Clauses of accruer should be so framed, that the shares of objects dying may go, not merely to survivors properly so called, but to the others of the devisees or legatees, thereby conferring on pre-deceased devisees or

Suggestions respecting clauses of accruer.

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—on failure

than one in equal shares ; But if there shall not be any child of mine who shall attain the age of twenty-one years or marry

Clauses of
SURVIVOR.

legatees (dying under circumstances which do not subject their shares to the divesting operation of the clause in question) disposable and transmissible interests. In fact, under a clause of accruer, correctly framed, each object, living the rest, and during the suspense of the absolute vesting of their shares, has a present disposable interest in such shares, every one of which is *ab initio* limited to him by way of executory devise or bequest. Cross-remainders stand upon the same principle. (Compare note (d) to Prec. XII. *ante*, p. 178.)

—should be
extended to
others as well
as survivors.

By way of illustration :—Suppose real or personal estate to be given by will equally among A., B. and C., with a gift over of the shares of any of them dying under the age of twenty-one years to the survivors or survivor ; A. attains twenty-one and then dies ; afterwards B. dies under twenty-one. Would the share of B. be divided between C., the surviving devisee, and the representatives of A., the deceased devisee, or go exclusively to C. ? If the words “survivors” or “survivor” were construed literally, the share in question would belong wholly to C. ; if construed “others or other,” the representatives of A. would participate. According to the latest decisions, it seems that the strict construction generally prevails (*Crowder v. Stone*, 3 Rus. 217 ; *Milsom v. Andry*, 5 Ves. 465 ; *Ranelagh v. Ranelagh*, 2 M. & K. 441 ; *Cromek v. Lumb*, 3 Y. & C. Ex. 565 ; *Leeming v. Sherratt*, 2 Ha. 14 ; *Willetts v. Willetts*, 7 Ha. 38 ; *Greenwood v. Percy*, 26 Be. 572 ; *Re Corbett's Trusts*, Joh. 591 ; *De Garagnol v. Liardet*, 32 Be. 608) ; and that, in order to warrant the translation of “survivor” into “other,” there must be an explanatory context. On the other hand, the latter construction has certainly prevailed in a few recent cases, even where it was unaided by the context (*Aiton v. Brooks*, 7 Sim. 204 ; *Cole v. Sewell*, 2 H. L. C. 186). In the former case, Sir L. Shadwell, V.-C. E., seemed to consider the strict interpretation to apply only where the gift was to survivors simply and absolutely, and that the more liberal construction might be adopted where such gift was to take effect on a contingency ; but this distinction does not reconcile the authorities ; as, in many of the cases in which “survivor” has been construed strictly, the gift was dependent on some collateral event.

“Survivor,”
when con-
strued
“other.”

A testator devised his real estate in thirds to his three daughters for life, with remainder to their children in tail, with cross-remainders to the survivors and others of the children ; and in case one or more of his daughters should die without issue, then the testator gave her or their share or shares to the survivors or survivor for life, with remainder to the children of such survivors or survivor in tail. Sir J. Leach, M. R., held that the word “survivor” in the latter instances was not to be extended to “other,” because survivors were to take as tenants in common for life, which was inconsistent with the notion that the testator meant that the children of a deceased daughter should stand in the place of their parent (*Winterton v. Cramford*,

[or, who being a son shall attain the age of twenty-one years, or being a daughter shall attain that age or be married, or, who
 of the pre-
 vious trusts;

1 R. & M. 407). His Honour's reasoning would have been conclusive, if the only estates created by the ulterior devise were for life (in which case indeed the point could not arise); but, inasmuch as remainders in tail to the children were appended to such estates for life, why might not the clause in question be construed as applying, with respect to surviving children, to both estates for life and the remainders; and, with respect to the deceased children, to the remainders only, *referendo singula singulis*? (See *Holland v. Allsop*, 29 Be. 498; *Re Keep's Will*, 32 Be. 122). It is clear, however, that although the word "survivor" must now be regarded as one which, when unexplained, ought like all others to retain its strict and proper signification (*Re Usticke*, 35 Be. 338), yet it will yield up its primary sense on a manifestation of intention in the context to use the term in the sense of "other" (*Wilmot v. Wilmot*, 8 Ves. 10; *Davidson v. Dallas*, 14 Ves. 576; *Barlow v. Salter*, 17 Ves. 479; *Smith v. Osborne*, 6 H. L. C. 375, 6 W. R. 21; *Re Tharp's Estate*, 1 D. J. & S. 453; *Hodge v. Foot*, 34 Be. 349; *Hurry v. Morgan*, L. R., 3 Eq. 152). For the construction of a gift to "survivors and others," see *Slade v. Parr* (7 Jur. 102). The preceding long range of cases on this much-debated point strongly evinces the expediency of preventing its occurrence by an express gift to the others, omitting survivors.

Another caution to be observed in regard to the clauses under consideration is, to make them expressly embrace the accruing as well as the original shares; otherwise their operation is confined to the original shares; see *Hawkins, Constr. Wills*, 268. Thus, if real or personal estate is given to A., B. and C., and it is provided, that, in case of the decease of any of them under the age of twenty-one years, their or his shares or share shall go to the others or other of them; A. dies under twenty-one, by which event his share devolves to B. and C. in moieties; if this be followed by the death of B., who dies under twenty-one, it is clear that the moiety which B. derived under the clause in question of A.'s share, does not go over to C. along with B.'s original share, but is transmissible to the representatives of B., as having vested in B. unaffected by the cross executory gift (*Woodward v. Glasbrook*, 2 Ver. 388; *Ex parte West*, 1 Br. C. 575; *Crowder v. Stone*, 3 Rus. 217; *Bright v. Rowe*, 3 M. & K. 316; *Gibbons v. Langdon*, 6 Sim. 260; *Macgregor v. Macgregor*, 2 Col. 192; *Barker v. Lea*, T. & R. 413), in the absence of a context evincing a contrary intention: the rule, however (which generally contradicts the intention of the testator), may be excluded by the context showing a clear intention to the contrary (*Eyre v. Marsden*, 2 Ke. 564; *Leeming v. Sherratt*, 2 Ha. 14; *Goodman v. Goodman*, 1 De G. & S. 695), or by showing a clear intention that the fund in question is an "aggregate fund" designed to be kept together (*Worlidge v. Churchill*, 3 Br. C. 465; *Douglas v. Andrews*, 14 Be. 347; *Dutton v. Crowdy*, 33 Be. 272). And see *Re Jarman's*

Accruing shares to be subjected to the operation of clauses of accruer.

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shall attain the age of twenty-one years, or, dying under that age, shall leave issue (*or*, leave a husband, or widow, or issue)

Trusts (L. R., 1 Eq. 71), as to separate use attaching to accrued as well as original shares.

To what
period sur-
vivorship
refers.

Obscurity as to the period to which survivorship refers, especially where the nature of the devise is such as to present a point of time other than the decease of the testator, to which it may by possibility be construed as referring, has produced numerous and conflicting decisions. In the case, for instance, of a gift "to A. for life, and after his decease to B., C. and D., as tenants in common, and the survivors and survivor of them, their, his or her heirs and assigns," if either of the devisees in remainder dies in A.'s lifetime, the question necessarily arises, whether the testator means survivors at his own death or at the death of the tenant for life. In regard to real estate, the decisions seem generally to make the death of the testator the period of ascertaining the objects (*Wilson v. Bayley*, 3 Br. P. 195; *Rose v. Hill*, 3 Bur. 1881; *Garland v. Thomas*, 1 B. & P., N. R. 82; *Edwards v. Symons*, 6 Tau. 213); and in one of such cases this doctrine was applied even to a devise to a class (*Doe v. Prigg*, 8 B. & C. 231; but see *Wordsworth v. Wood*, 4 M. & C. 641; 1 H. L. C. 129); but in respect of real estate the law on this point was stated to be still unsettled so recently as the case of *Taaffe v. Conmee* (10 H. L. C. 64; 8 Jur., N. S. 919). In the later case of *Re Gregson's Trusts* (2 D. J. & S. 428, reversing 2 H. & M. 504) it was held that the rule laid down in *Cripps v. Wolcott* (4 Mad. 11) applies to real as well as personal estate.

Real estate.

Personal
estate.

With respect to personal estate, the construction in the recent cases refers survivorship to the death of the legatee for life (*Browne v. Lord Kenyon*, 3 Mad. 410; *Cripps v. Wolcott*, 4 Mad. 11; *Pope v. Whitcombe*, 3 Rus. 124; *Hearn v. Baker*, 2 K. & J. 383; *Nevill v. Boddam*, 28 Be. 554; *Thompson v. Thompson*, 29 Be. 654; *Young v. Robertson*, 4 Macq. 314; 8 Jur., N. S. 825); or where there are successive tenants for life, to the death of the last living tenant for life (*Howard v. Collins*, L. R., 5 Eq. 349); and even in some earlier cases, the circumstance of the subject of gift not being *in esse* until the decease of the tenant for life (as where the gift is of the produce of real estate, to be converted at that period), was thought to favour the same construction (*Brograve v. Winder*, 2 Ves. j. 634; *Newton v. Ayscough*, 19 Ves. 534; *Hoghton v. Whitgreave*, 1 J. & W. 146); and such was also the effect of there being in the same will an express gift to survivors at that period (*Daniell v. Daniell*, 6 Ves. 297; and see *Haws v. Haws*, 3 Atk. 524). But if the gift is immediate, *i. e.* to take effect in possession at the death of the testator, the words in question are from necessity referred to his death (*Lord Bindon v. Earl of Suffolk*, 1 P. W. 96; *Smith v. Horlock*, 7 Tau. 129). It seems that where the language of the will admits of survivorship being referred either to the time of distribution, or to the attainment by the legatees of majority, the Courts will incline to the latter construction, in order that the legatees who

—for a person named, if then living ;
if not,
—for such of several persons named as shall be then living ;
if none,
—for their issue then living, per stirpes.

Trustees to hold a moiety of each child's share, upon trusts.

have attained the prescribed age may not be deprived of their legacies by their subsequent decease before the time of distribution (*Bayard v. Smith*, 14 Ves. 470; *Hallifax v. Wilson*, 16 Ves. 170; *Crozier v. Fisher*, 4 Rus. 398; see also *Jones v. Jones*, 13 Sim. 561; *Bright v. Rowe*, 3 M. & K. 316; *Butterworth v. Harvey*, 9 Be. 130). For a gift to A. for life and after his death to his children, to be divided at twenty-one, "with benefit of survivorship," see *Corneck v. Wadman* (L. R., 7 Eq. 80).

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—
—for the
same child
for life.

[Daughter's
share.
Power to
trustees to
settle.]

said, upon the trusts following; (namely), UPON TRUST to expend the annual produce in the maintenance and support, or otherwise for the benefit of the same child, being under the age of twenty-one years, in such manner as my said trustees or trustee shall, in their or his discretion, think fit; and to pay the annual produce to the same child, being of the age of twenty-one years, for his or her life, and if the same child shall be a daughter and married, then for her separate use, and not by way of anticipation; [And if the trust lastly hereinbefore contained in favour of my same child being a daughter shall not be effectual in law to secure to her, as against any and every husband whom she may marry subsequently to my decease, the separate enjoyment without power of anticipation of the said annual produce, then I EMPOWER my said trustees or trustee, by deed to be executed by them or him, either in contemplation or after the solemnization of any or every marriage which she may contract, subsequently to my decease, to revoke the trust hereinbefore contained in her favour, so far as concerns the annual produce to accrue due during her then intended coverture or then coverture, and to declare such other trust or trusts thereof as shall be effectual in law to secure to her, as against her then intended husband or then husband, the separate enjoyment thereof, without power of anticipation; And if by any means, voluntary or involuntary, the said annual produce, or any part thereof, would, but for this clause, be disposed of so as to deprive her, whether covert or sole, of the personal receipt thereof for her own benefit, then the trust hereinbefore contained in her favour, so far only as concerns the annual produce which would be so disposed of, shall thenceforth cease; and the same annual produce, but subject and without prejudice to the power lastly hereinbefore contained shall, during the remainder of her life, be applied by my said trustees or trustee in such sums, at such periods and in such manner as they or he shall, in their or his absolute discretion, think fit, for the benefit of all or any one or more of the objects following; (namely), my same daughter, her husband, children, and more remote issue, and the persons who, if she were dead without having had any issue, and without having exercised any of the powers of appointment hereinafter given to her,

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would be entitled to the same annual produce (c);] And after the death of the same child, IN TRUST for all or any of the children and more remote issue of the same child (such more remote issue to be born in the lifetime of the same child), in such manner as the same child (and, if a daughter, notwithstanding coverture) shall by deed or will appoint; And, in default of appointment, UPON TRUSTS and subject to provisions in favour of the children of the same child, corresponding with the trusts and provisions hereinbefore contained in favour of my own children, (exclusive of the trusts declared by this proviso,) but so that no appointee under the aforesaid power of appointing to children and issue shall participate in the unappointed fund without bringing the appointed share or interest into hotchpot; But if there shall not be any child of the same child who shall attain, &c. [*as before, in respect of testator's children*], then, if the same child shall be a son, IN TRUST for his absolute use, or, if the same child shall be a daughter, IN TRUST for such persons, and in such manner, as she, whether sole or covert, shall by her last will appoint; And in default of appointment, IN TRUST for such persons, exclusive of a husband, as shall at her death be her next of kin, entitled, as such, to her personal estate under the statutes for the distribution of the personal estate of intestates, and in the proportions in which they would be so entitled. AND I DECLARE that the trusts for investing and varying investments hereinbefore contained shall extend to each share to be retained as aforesaid, but shall not be executed during the life of the child of mine entitled to the annual produce of such share, without his or her consent in writing. PROVIDED FURTHER, that if any child or children of mine shall die in my lifetime, and any issue of such child or children respectively shall be living at my death, then the share which any or every such child would, if living, have taken of my said trust fund shall be subject to the same trusts and provisions in favour of the children of the same child, as are hereinbefore referentially declared of a moiety of the share of each child of

—for the child's issue, as the child shall appoint;

—for the child's children, by reference to the previous trusts for the testator's children;

—for the child absolutely, if a son;

—if a daughter, for such persons as she shall by will appoint; —in default, for her next of kin.

Previous trust for investment to extend to child's settled moiety, qualified by requiring child's consent.

Shares of children dying in testator's lifetime subjected to the trusts of the above moiety.

(c) Since the decision in *Tullett v. Armstrong* (4 M. & C. 392; ante, p. 201), the clauses within brackets may appear to savour of superabundant caution. It should be recollected, however, that without a clause of cesser or a gift over, the interests of women are during coverture still unprotected.

Married woman.

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Power to
trustees to
lease and
manage real
estates;

—compound
debts;

—give re-
ceipts,

Power to
appoint new
trustees.

Original
number of
trustees to be
preserved.

[Power to
increase or
diminish the
original
number of
trustees.]

Appointment
of executors.

Legacy to
executors.

mine, and as shall be capable of effect, but, so subject, shall follow the destination of the residue of my said trust fund. PROVIDED FURTHER, that my said trustees or trustee shall have power, until my real estate shall be sold, to grant leases thereof for any term not exceeding — years in possession, at the best rent, and generally to manage and improve the same at their or his discretion; [And to compound debts and demands, grant indulgences to debtors, and submit disputes to arbitration; And to give receipts for money paid by purchasers and others to the said trustees or trustee, which receipts shall discharge the persons taking the same from liability to see to the application of the money.] PROVIDED FURTHER, that when and so often as a vacancy shall occur in the trusteeship of my will, by reason of any of ^{*}my said trustees or their successors dying (whether in my lifetime or after my death) or being unwilling, incompetent, or unfit to act, or being desirous of retiring from the office, the trustees or trustee for the time being competent to act, whether intending to continue in the trust or not, or, if there shall not be any such trustee, then my acting executors or executor for the time being, or my administrators or administrator for the time being, shall have power to nominate a trustee or trustees to supply the vacancy; and thereupon my trust property shall vest or be vested in the old jointly with the new trustees or trustee, or in the new trustees solely, as the case may require: Provided, nevertheless, that the original number of trustees shall not by the execution of the preceding power be increased or diminished, but each new trustee shall be nominated to fill the place of an old trustee. [Or, PROVIDED FURTHER, that my trustees or trustee for the time being shall have power to add to or decrease from time to time the original number of trustees, so as the number be not raised above (*five*) nor reduced below (*two*)]. I APPOINT the said [*trustees*] to be executors of my will, and request each of them to accept a legacy of £ —, to be retained at the end of three calendar months from my decease, as an acknowledgment for the trouble which he will have in the execution of my will. AND I REVOKE all former wills (*d*). IN WITNESS, &c.

As to clauses
of revoca-
tion.

(*d*) A paper duly executed, by which a testator disposes of the whole of his property, is a total revocation of all previous wills. But a clause of

revocation is useful in those instances in which the intention to make a new will is not so clearly indicated as to preclude attempts to adopt wholly or partially the contents of former wills, as part of the testator's disposition, since a will may be composed of several papers of different dates, each professing to be the will, or even the "last will," of the testator, where they are capable of standing together. See note (*u*) to sect. 20 of the Wills Act, *ante*, p. 32. An express clause of revocation in the last paper of course prevents the occurrence of any such question, by destroying the effect of, and consequently removing out of the way, any and every prior testamentary document.

Clause re-
voking
former wills.

No. XVIII.

WILL of a MARRIED MAN, providing for a Wife, and for Adult and Infant Children.—Devise to Wife during Widowhood of Freehold Dwelling-house, with the Use of the Furniture, &c.—Devise of other Freehold Property to Two Sons in common in Fee, subject to a Charge in aid of the Personal Estate.—Devise of other Freehold Property, upon Trusts in favour of a Married Daughter, for Life inalienably, and her Issue, and ultimately upon the Trusts declared of the residuary Real Estate.—Residue of Real and Personal Estate vested in Trustees for Conversion into Money, with discretionary Power to postpone Conversion, and Direction as to Unconverted Estate; Produce, subject to a Provision for Wife by way of Annuity (reducible on Marriage), given to Children equally; each Child's Share strictly settled on such Child for Life inalienably, and on his or her Issue, with Power of appointing a Life Interest to a Husband or Wife.—Provisions for Maintenance and Advancement, &c., with an ultimate Limitation over in favour of the other Children and their Issue, &c.—Declaration as to Dower of Widow.—Devise of Mortgage and Trust Estates.—Powers to give Receipts and appoint Trustees.—Appointment of Executors and Guardians.

THIS IS THE LAST WILL AND TESTAMENT of me [*testator's name, residence and quality*]. I BEQUEATH to my dear wife [*name*], absolutely, all the wines, liquors, fuel and other consumable stores and provisions which shall belong to me at my decease. I DEVISE the freehold messuage or dwelling-house, with the offices, gardens, and the actual and reputed appurtenances belonging thereto, at — aforesaid, now in my own occupation, together with the use and enjoyment therein of the

Wines, &c.
to wife.

Devise of
freehold
dwelling-
house, with
use of furni-
ture, &c., to

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—
wife during
widowhood.

furniture, pictures, prints, musical instruments, plate, linen, china, glass and other household effects not hereinbefore bequeathed, which shall be in or about the same at my decease, to my said wife [*name*], during her life, if she shall continue my widow, she insuring and keeping the same insured against loss by fire, to the full value [*or, to three-fourths of the value*], in the names or name of the trustees or trustee for the time being of this my will, and also keeping the same in good repair and condition (reasonable wear and tear excepted). AND I DIRECT that my executors shall cause an inventory to be taken of the chattels comprised in the preceding bequest, and two copies to be made thereof, and respectively signed by my said wife and my executors, before the delivery of such chattels to her, one of such copies to be delivered to her, and the other to be kept by them. I DEVISE my warehouse adjoining my dwelling-house, my four cottages now in the several occupations of [*names*], all which hereditaments are situate at — aforesaid, also the said freehold messuage or dwelling-house now in my own occupation, with the offices, gardens and appurtenances thereunto belonging (but subject, as to the last-mentioned messuage and premises, to the estate of my said wife therein under the devise hereinbefore contained), UNTO AND TO THE USE of my sons [*name*] and [*name*], as tenants in common, their respective heirs and assigns, nevertheless subject to and charged with the payment by my said sons respectively in equal moieties, their respective heirs or assigns, within — calendar months next after my decease, unto my executors, of the sum of £ — sterling, with interest for the same after the rate of four per centum per annum from my decease, to be applied as part of my personal estate hereinafter bequeathed. I DEVISE my freehold messuages or dwelling-houses, with the outbuildings, gardens, and the actual and reputed appurtenances thereunto belonging, and the closes or parcels of land held therewith, situate at —, now in the occupation of [*names*], with their actual and reputed appurtenances, to the use of [*names*], their executors, administrators and assigns, during the life of my daughter [*name*], the wife of [*name*], upon the trusts following; (namely), UPON TRUST, [if my said daughter shall be married at my decease,] to pay the rents and profits thereof, as and when the same shall become due, and not by

Inventory of
furniture,
&c. to be
taken.

Devise of
freehold
estates, in-
cluding the
premises de-
vised to the
wife for life,
to two sons
in common in
fee, charged
with a sum
of money to
be paid to
executors in
aid of the
personal
estate.

Devise of
other free-
hold estates
to trustees,
for the life
of a married
daughter, on
special trusts
for her sepa-
rate and in-
alienable
use;

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way of anticipation, into her own hands [during her then coverture], for her separate use, independently of her husband, and for which rents and profits her receipts alone shall be discharges to my said trustees; [And upon further trust, immediately after any and every marriage which my said daughter, whether married at my decease or not, shall contract after my decease, to create and declare, by some instrument in writing under the hands of my said trustees, a trust of the rents and profits thereof in her favour, during her then coverture, for her separate and inalienable use, similar to the trust lastly hereinbefore contained; And upon further trust, during any and every discoverture of my said daughter, to pay to her so much of the rents and profits thereof as would not, although the same were payable to her, be by her act or default, or by operation of law, so disposed of as to prevent her personal enjoyment thereof; and to apply so much of the rents and profits thereof as would, if the same were payable to her, be disposed of as last aforesaid, for the benefit of all, or some, or one of her children, or other issue for the time being in existence, if any, or, if none, of the person, or some or one of the persons, who, if the trusts, powers and provisions hereinafter contained concerning the same hereditaments in favour of her husband, children and issue had failed of effect, would be entitled to the same rents and profits, in such proportions, at such times, and in such manner as my trustees shall think fit;] AND I EMPOWER my said daughter, by her will, to appoint to or in favour of her present or any future husband my last-mentioned hereditaments, or any part thereof, for his life, or for any estate or interest determinable on or before his death; [Or, I empower my said daughter, whether sole or covert, by any deed or deeds, with or without power of revocation and new appointment, or by her last will, to limit the said hereditaments, or any part thereof, to any or every husband whom such daughter shall have married, or be about to marry, and shall actually marry, for his life, in remainder expectant upon the decease of the said daughter:] AND I ALSO EMPOWER my same daughter, by deed, to grant leases of the same hereditaments, or any part or parts thereof, for any term or terms of years not exceeding [*twenty-one*] years in possession, at the best rent, without taking any fine or premium. AND, after the decease of my said daughter, subject to any appointment in

—with power
for her to
appoint a life
interest to
any husband;

[another
form;]

—and to
lease;

favour of a husband to be made by her as aforesaid, I DEVISE the same hereditaments TO SUCH USE or uses, for such estates, and in such manner for the benefit of all or any one or more of the children and other issue of my said daughter (such other issue to be born in her lifetime), as she, by any deed or deeds, with or without power of revocation and new appointment, or by her will, shall appoint; And, in default of appointment, TO THE USE of her child, if only one, or of her children, in equal shares, if more than one, in fee simple, with cross executory limitations of the shares original and accruing of each of the same children, in the event of his or her dying under the age of twenty-one years without having married, to the use of the others in equal shares, and the other in fee simple; with a limitation over of the entirety, in the event of there not being any child of my said daughter, or not any such child who shall attain the said age or marry, TO THE USE of my said sons [*names*], their heirs and assigns, to be disposed of as part of the residue of my real estate hereinafter devised, according to the then subsisting trusts of such residue. I DEVISE all the real estate not hereinbefore devised, to which I shall be entitled, or over which I shall have any disposing power at my decease (except estates vested in me as trustee or mortgagee), and I BEQUEATH the residue of the personal estate to which I shall be then entitled (including the furniture and effects whereof the use and enjoyment are hereinbefore given to my said wife, subject to her interest therein under such gift), unto and to the use of the said [*names*], their heirs, executors, administrators and assigns respectively, UPON TRUST to sell my said real estate, and so much of my said residuary personal estate as shall be of a saleable nature, together or in parcels, by public auction or private contract, with liberty to make any special or other conditions as to the title or evidence of title, or otherwise, and to buy in the premises at any sale by public auction, and to rescind, either on terms or gratuitously, any contract for sale, and to resell without being answerable for any consequent loss; and to get in the rest of my residuary personal estate, and to dispose of the net moneys to arise from such real estate and residuary personal estate, after payment thereof of my just debts, and funeral and testamentary expenses, and the expenses incident to the execution of the preceding trust, according

—to her children, as she shall appoint;

—to her children in common in fee, with cross executory limitations;

—to trustees in fee, upon the trusts after declared of the residuary real estate.

Devise of residue of real and personal estate to trustees;

—to sell and convert;

—to invest surplus, after paying debts, &c.

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Discretionary power to postpone the sale and conversion ;

—the unsold and unconverted estate to be subject to the trusts declared of the produce.

Trusts of the residuary funds ;

—to pay annuity to wife for life, reducible on her marrying again.

Fund to be set apart for answering the annuity in exoneration of the general fund ;

to the trusts hereinafter declared concerning the same; Nevertheless, I give to my trustees discretionary authority to postpone the sale of all or any part of my residuary real estate, and the getting in of such parts of my residuary personal estate as shall consist of stocks, funds, shares or securities of any description whatever, for such period as to them shall seem expedient [*or*, until some one or more of the persons beneficially entitled in possession to any share or shares of the trust premises shall in writing require the sale and getting in thereof]; and also to let from year to year, or for any term not exceeding [*seven*] years in possession, at the best rent, and to manage at their discretion, the unsold real estate; But I declare that, from the time of my decease, the unsold real estate, and outstanding personal estate, shall be subject to the trusts hereinafter declared concerning the said net moneys; and the rents, interest and yearly produce thereof shall be deemed annual income for the purposes of such trusts, and such real estate shall be transmissible as personal estate, and be considered as converted in equity. I DIRECT my trustees to stand possessed of the net moneys to arise as aforesaid, UPON TRUST, thereout, in the first place, to pay unto my said wife an annuity of £—— during her life, by four equal quarterly payments, the first of such quarterly payments to be made at the expiration of three calendar months from my decease; But I direct that, in the event of my said wife marrying again, the said annuity of £—— hereinbefore made payable to her shall be reduced to an annuity of £——, such reduced annuity to be payable quarterly, and the first reduced payment to be made on the quarterly day of payment which shall happen next after the marrying again of my said wife. And I also direct that a proportionate part of the said annuity of £—— or £——, as the case may be, shall be paid down to the day of the death of my said wife. AND I EMPOWER my trustees if they shall think fit, out of the same trust-moneys, to appropriate a sum sufficient at the period of appropriation as a fund for answering the said annuity to my said wife, by investing the same sum in the purchase, in their names, of Three per Cent. Bank Annuities; And I declare, that, from and after such appropriation, the residue of the same trust-moneys shall be liberated from the trust for payment of the said annuity; but the appropriated fund shall (without prejudice to the said

annuity) be subject to the trusts hereinafter declared concerning the same trust-moneys; And subject to the trust aforesaid, UPON TRUST to divide the same trust-moneys among all my children in equal shares; But subject to the trusts following: (namely), as to the yearly income of the share of each son accruing due in his lifetime, UPON TRUST to pay to him so much of the same yearly income as would not, although the same were payable to him, be by his act or default, or by operation of law, so disposed of as to prevent his personal enjoyment thereof, and to apply so much thereof as would, if the same were payable to him, be disposed of as last aforesaid, for the benefit of his wife, children and other issue for the time being in existence, or some one or more of those objects, if any, or, if none, of the person, or some one or more of the persons, who, if the trusts, powers and provisions hereinafter contained concerning the same share, in favour of his wife, children and issue, had failed of effect, would be entitled to the same income, in such proportions, at such times, and in such manner as my trustees shall in their discretion think fit; And as to the yearly income of the share of each daughter accruing due in her lifetime, UPON TRUST, during any and every her coverture, to pay the same yearly income, as and when the same shall become due, and not by way of anticipation, into her own hands, for her separate use, independently of her husband, for which yearly income her receipts shall be discharges to my trustees; AND UPON FURTHER TRUST, during any and every her discoverure, to pay her so much of the same yearly income as would not, although the same were payable to her, be by her act or default, or by operation of law, disposed of so as to prevent her personal enjoyment thereof, and to apply so much of the same yearly income as would, if the same were payable to her, be disposed of as last aforesaid, for the benefit of all, or some, or one of her children, or other issue for the time being in existence, if any, or, if none, of the person, or some or one of the persons, who, if the trusts, powers and provisions hereinafter contained concerning the same share, in favour of her husband, children and issue, had failed of effect, would be entitled to the same yearly income, in such proportions, at such times, and in such manner as my trustees shall think fit; And

—to divide the fund among the testator's children equally.
Trusts of the share of each child;
—inalienable life interest strictly guarded;

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—children
and issue, as
parent shall
by deed or
will appoint;

—children
equally, with
benefit of
accruer;

—testator's
other chil-
dren equally.

Power for
child to ap-
point a life
interest to a
husband or
wife.

Maintenance
and advance-
ment of
grand-
children and
remoter
issue.

as to the capital of the share of each child of mine, and the yearly income thereof to accrue due after his or her decease, UPON SUCH TRUST OR TRUSTS for the benefit of all or any one or more of the children and other issue of my same child (such other issue to be born in his or her lifetime), as my same child, by any deed or deeds, with or without power of revocation and new appointment, or by his or her will, shall appoint; And, in default of such appointment, In trust for my grandchild, if only one, or my grandchildren equally, if more than one, issue of my same child; but, on the death of each grandchild, who, being a son, shall die under the age of twenty-one years, or, being a daughter, shall die under that age, without having been married, as well the share originally given, as the shares accruing under this cross executory trust to such grandchild, shall accrue to the other grandchildren equally, or to the other grandchild: but no grandchild, in whose favour an appointment shall be made under the power last aforesaid, shall participate in the unappointed fund, without bringing the appointed interest into hotchpot; And if no grandchild, being a son, shall attain the age of twenty-one years, or, being a daughter, shall attain that age or be married, then IN TRUST for my other children in equal shares. AND I EMPOWER each child of mine, by his or her will, to appoint to or in favour of his or her wife or husband the whole or any part of the yearly income of his or her share for the life of such wife or husband, or for any interest determinable on or before the death of such wife or husband. AND I EMPOWER my trustees to apply for the maintenance and education, or otherwise for the benefit of each grandchild or more remote issue, during his or her minority, the whole or any part of the income of the share to which such grandchild or issue shall be entitled in possession; and the unapplied income, if any, shall be accumulated, and the accumulations be subject to the like power, and, so subject, shall form part of the capital of the share whence the same income shall have arisen. AND I EMPOWER my trustees to apply, for the advancement, or otherwise for the benefit, of each grandchild, any part or parts, not exceeding in the whole one-half, of the capital of the share to which such grandchild shall be entitled, either in possession or in reversion immediately expectant on a prior life interest, but no such application

of a reversionary share shall be made, without the previous consent in writing of the person on whose death such prior interest shall be determinable. AND I EMPOWER my trustees to apply, for the maintenance and education, or otherwise for the benefit, of each child of mine who shall be an infant at my decease, during his or her minority, the whole or any part of the income of his or her share; and the unapplied income, if any, shall be accumulated, by investing the same in manner hereinafter directed with respect to the share of each of my children, and the accumulations shall be subject to the like power, and, so subject, shall form part of the capital of the share whence the same income shall have arisen. AND I EMPOWER my trustees, notwithstanding the trusts hereinbefore declared of the share of each child of mine, to apply, at any period or periods of the life of each such child, for his or her advancement, or otherwise for his or her benefit, any part or parts, not exceeding in the whole one-half, of the capital of his or her share. AND I DECLARE that the maintenance and advancement clauses hereinbefore contained shall apply as well to accruing as to original shares, and that such clauses, so far as they relate to grandchildren and remoter issue, shall be subject, in respect of shares taken under any exercise of the power of appointing to grandchildren and remoter issue hereinbefore contained, to the same power. I DIRECT my trustees to invest the share of each child of mine, in the names of my trustees, in or upon the public funds or securities of the United Kingdom, or on mortgage of freehold, copyhold, or leasehold estates in England, Wales, [or Ireland], or upon the bonds or debentures of any railway company in England at the time of the investments respectively paying dividends, with liberty for my trustees to change the investment from time to time for any other or others of the description aforesaid; but while any trust of the income of such share shall be subsisting for the life of such child, or of his or her wife or husband, no such change shall be made without the previous consent in writing of the person on whose death such trust shall be determinable, unless such person shall be an infant [*or*, but during the life of such child, being adult, no such change shall be made without his or her previous consent in writing]; and I declare that this direction to invest, and power to change the investment, shall

Maintenance and advancement of testator's children;

—extended to accruing shares, and subjected to the power of appointing among issue.

Direction as to investment of children's shares.

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Powers to be exercisable by females notwithstanding coverture.

Shares accruing to testator's children subjected to the trusts of their original shares.

Provision to testator's wife to be in satisfaction of dower.

Substitution of grandchildren for children of testator predeceasing him.

Devise of mortgage and trust estates.

Receipts of trustees to be

extend to the unapplied income hereinbefore directed to be accumulated. I DECLARE that females to whom powers of appointing or consenting are hereby given, shall be competent to exercise such powers, notwithstanding coverture. AND I SUBJECT the share or shares which, under the ultimate trusts hereinbefore declared concerning the original share of each of my children, each or any other child of mine shall eventually take, to all the trusts and provisions herein contained concerning the original share of such other child, inclusively of this clause. I DECLARE (a) that the provision hereinbefore made for my said wife is in satisfaction of the dower and thirds, if any, to which she shall be entitled out of any real estate of mine. I DECLARE that if any child of mine shall die in my lifetime, and any issue of such child shall be living at my decease, then the shares, as well accruing as original, to which the child so dying would, if living at my decease, have been entitled under the trusts aforesaid, shall be held by my trustees upon such trusts and subject to such provisions as the same would have been held if such child had died immediately after my decease. I DEVISE all the real estates which at my decease shall be vested in me as mortgagee or trustee to my said trustees [*names*], subject to the equities affecting the same respectively (b). I DECLARE that the receipts of my trustees

(a) See the Dower Act, 3 & 4 Will. 4, c. 105, ss. 7—9.

(b) It is now settled, that a general devise will carry estates vested in the testator as trustee or mortgagee (*Bainbridge v. Lord Ashburton*, 2 Y. & C. Ex. 347; *Langford v. Auger*, 4 Ha. 313; *Greenwood v. Wakeford*, 1 Be. 576), unless a contrary intention be evinced by the nature of the limitations or by the purposes to which the devised property is subjected; as where the devise is to uses in strict settlement (*Thompson v. Grant*, 4 Mad. 438), or for an estate in fee, subject to an executory limitation over, or the devised estate is directed to be sold (*Wall v. Bright*, 1 J. & W. 494; *Ex parte Marshall*, 9 Sim. 555), or is charged with debts, annuities or legacies (*Roe v. Reade*, 8 T. R. 119; *Lord Braybroke v. Inskip*, 8 Ves. 417; *Ex parte Morgan*, 10 Ves. 101; *Dimes v. Grand Junction Canal Company*, 9 Q. B. 469), or is otherwise disposed of in a manner inappropriate to trust and mortgage estates (*Re Finney's Estate*, 3 Gif. 465; see also Hawkins, Constr. Wills, 35; and the notes to *Lord Braybroke v. Inskip*, in Tud. L. C. R. P. 876). There may be cases in which a trust estate would not pass, but the legal estate in a mortgage would (*Re Stevens' Will*, L. R., 6 Eq. 597).

General devise carries trust and mortgage estates, when.

shall exonerate purchasers and others paying or transferring moneys or funds to such trustees by virtue of my will from all

discharges to purchasers and others.

A devise of all the testator's property to his wife for her sole use for ever has been held not to pass trust estates, on the ground that the words created a trust for separate use (*Lindsell v. Thacker*, 12 Sim. 178); but in *Lewis v. Mathews* (L. R., 2 Eq. 177), a devise of all the testator's property to a feme sole, her heirs, executors, administrators and assigns, for her and their own sole and absolute use, was held to include trust estates. And a general devise "to A. B., his heirs, executors and administrators, for his and their own use and benefit," was held to pass real estate vested in the testator as trustee (*Sharpe v. Sharpe*, 12 Jur. 598). The mere fact of the devisees in fee being made tenants in common will not, it seems, exclude trust estates, though it is more usual and convenient to vest such estates in the devisees jointly in order that they may devolve to the survivor. (See *Ex parte Whitacre*, Rolls, 22 July, 1807, cited 1 Sand. Uses, 421, n.) Nor does the circumstance of the testator having reserved to the devisee a general power of appointment exclude trust estates (*Ex parte Shaw*, 8 Sim. 159).

A point which has been much discussed is, whether the legal estate in mortgaged lands will pass by the words "mortgages" or "securities for money." The negative was determined in the cases of *Sylvester v. Jarman* (10 Pri. 76), and *Galliers v. Moss* (9 B. & C. 267); but in the two subsequent cases of *Ex parte Barber* (5 Sim. 451), and *Mather v. Thomas* (6 Sim. 115, 10 Bing. 44), the words in question were held to carry such estate; the Court, in both these cases, relying much on the fact of the word "heirs" occurring as a word of limitation appended to the devise in question (but see 5 De G. & S. 647). It is now settled that if securities are given, the mortgaged estate will pass, but in a will dated before 1838 it is of course necessary that the mortgage precede the will; and whatever the date of the will, if the money merely is given, the estate will not pass (*Re Field's Mortgage*, 9 Ha. 414; *Re King's Mortgage*, 5 De G. & S. 644; *Knight v. Robinson*, 2 K. & J. 503; *Rippen v. Priest*, 13 C. B., N. S. 308); though in some cases, where the due execution of the trust required that the devisee should have complete dominion over the estate, the words "all moneys upon mortgage" have been held to pass the legal estate in the mortgaged lands (*Doe v. Bennett*, 6 Exch. 892; 20 L. J., Exch. 323; see also *Re Arrowsmith's Trusts*, 6 W. R. 642; Hawkins, Constr. Wills, 48). The broad principle governing all these cases is, that the testator intended to place his devisee, the object of his bounty, in his own position, and to enable him to compel payment of the mortgage debt by giving him the legal estate in the mortgaged lands.

The legal estate in mortgaged land passes by the words "securities for money," "mortgages."

Where an outstanding trust or mortgage estate remains in the testator after the trusts or incumbrances affecting it have been satisfied, it is often expedient to devise the property directly to the cestui que trust or mortgagor, instead of vesting it in the trustees of the will, by which means the

Suggestion as to the devise of trust and mortgage estates.

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liability in respect of the application thereof. I APPOINT
[*names and descriptions*] to be trustees of this my will for all

Trust estates. necessity of a further conveyance is avoided: but this does not now apply to a mortgage for a term of years, which, when satisfied, becomes extinguished by the operation of the important Act of 8 & 9 Vict. c. 112, for rendering the assignment of satisfied terms unnecessary. And where a mortgage debt is specifically bequeathed, the estate charged with the debt, whether in fee or for years, should be expressly devised to the legatee.

Cooke v. Crawford.

If the case of *Cooke v. Crawford* (13 Sim. 91) were rightly decided, it would behove a testator to pause before he devised estates vested in him as trustee, since it was there held, that a trust for sale of lands which had been devised to A. and his heirs upon trust to be sold could not be executed by a devisee of A. But "the decision in that case has been often understood as going far beyond what it really imported. There is no doubt that a trustee can devise a trust estate; but the question in every case is whether the devise is in accordance with the title under which the trustee holds" (*Per V.-C. Parker in Wilson v. Bennett*, 5 De G. & S. 479). The doctrine of *Cooke v. Crawford* will not be extended (3 K. & J. 590), and the case of *Titley v. Wolstenholme* (7 Be. 425), happily has removed much of the apprehension which *Cooke v. Crawford* at first excited. In *Titley*

Titley v. Wolstenholme.

v. Wolstenholme real and personal estate were devised and bequeathed to trustees, their heirs, executors, administrators and assigns, upon certain trusts, which the testator repeatedly declared were to be exercised by them, and the survivors and survivor of them, and his or her assigns. The survivor of the trustees devised and bequeathed the trust estates to certain trustees, upon the trusts of the original will; and the question was, whether this was a breach of trust. Lord Langdale, M. R., decided in the negative. This case, therefore, has established, that where a trust for sale, or any other trust involving the exercise of discretion, is limited to a person, his heirs *and assigns*, such trust may be executed by a devisee of the trustee, and is not restricted to heirs properly so called; this decision was expressly followed in *Hall v. May* (3 K. & J. 585); and the practice of inserting a general devise of trust estates of inheritance is now re-established (4 Dav. Conv. by Waley, 53).

Hall v. May.

It may be useful, in concluding this note, to draw attention to the fact (which is often overlooked), that the inquiry, whether trust estates do or do not pass by a devise, arises only where there is an existing outstanding legal estate sufficient to carry with it the right to recover the possession; for if the estate has been so long outstanding, or, to speak more distinctly, if the trustee has been so long out of possession, that the property has become irrecoverable by him under the Statute of Limitations (3 & 4 Will. 4, c. 27), his estate must be considered to have ceased, and the legal ownership to have become identified with the possession. On this point see *Doe v. Phillips* (10 Q. B. 130; 16 L. J., Q. B. 270; 11 Jur. 692); the notes

Power to appoint new trustees.

the purposes thereof. I DECLARE that if the said trustees, or either of them, shall disclaim, or if they or either of them, or any trustees or trustee to be appointed under this clause, or by a court of competent jurisdiction, or otherwise according to law, shall die, whether in my lifetime or afterwards, or shall become incompetent or unfit to act as trustees or trustee of my will, or shall cease to reside in England or Wales, or shall desire to retire from the trusteeship, it shall be lawful for such child or children of mine as shall for the time being be living and of the age of twenty-one years, or the major part of such children, if any, or if there shall not be any such child, then for my said wife during her widowhood, and after her decease or second marriage for the trustees or trustee for the time being of my will competent to act, whether disclaiming or declining further to act or not, or if none, for my proving executors or executor for the time being, or my administrators or administrator for the time being, by any instrument in writing, to appoint any person or persons to be trustee or trustees in the place of the trustee or trustees disclaiming, dying, or declining or becoming incompetent or unfit to act, or desiring to retire from the trusteeship: AND I FURTHER DECLARE that the clauses hereinbefore contained naming or referring to "my trustees" shall extend and be applied to the trustees or trustee for the time being of my will. I APPOINT my said wife, during her widowhood, and the said [names], to be executors of my will and guardians of my infant daughter. LASTLY, I REVOKE all former wills, declaring this writing alone to express the whole of my will. IN WITNESS, &c.

Powers given to trustees named extended to trustees for the time being.

Appointment of executors and guardians.

to *Nepean v. Doe* and *Taylor v. Horde*, in 2 Smith, L. C. 611, 652; and some remarks, 13 Jur. (pt. 2), 2.

And, on devises by mortgagees and trustees, see 1 Jarm. Wills, chap. 21.

No. XIX.

WILL of a MARRIED MAN, disposing of Real and Personal Estate in favour of his Wife and Children.—Devise of Part of the Real Estate to Testator's Children in Fee, giving them a Power of Appointment, and securing the Rents for the separate Use of Daughters; of other Part to a married Daughter, and her Husband, successively for Life, and her Children in Fee; of other Part to a Son and his Wife, successively for Life, and their Children in Fee; of other Part to a Son for Life, then to his Sons successively in Fee, by way of Executory Devise, with a Limitation over to his Daughters; of other Part to Testator's Wife during Widowhood, then to Trustees for Sale, with Power to concur with the Wife in a Sale.—Devise of Residue of Freehold and Leasehold Estate, to Trustees for Sale, with full discretionary Powers as to the Mode and Terms of Sale, and the Management in the meantime.—Copyhold Estates are subjected to the same Dispositions, with Power for Trustees to appoint the same to Purchasers.—Permission to Wife to occupy Dwelling-house, &c. during Widowhood; Specific and Pecuniary Bequests to Wife.—Bequest of Residuary Personal Estate to Trustees to be converted, with particular Powers and Provisions applicable to Contingent and Reversionary Property, Annuities and other determinable Investments.—Produce of Residuary Real and Personal Estate to be invested, and Income paid to Wife during Widowhood; Capital to Children equally, but so as to postpone, as far as may be, the Vesting till Twenty-five.—Ultimate Trust (subject, as to Part, to Wife's Appointment) for Testator's Brothers and Sisters, and their Issue per Stirpes.—Gifts to Wife, to be accepted in lieu of Dower.—Provision for letting in the Families of Testator's Children dying in his Lifetime.—Settle-

ment of Daughters' Shares upon them and their Issue; with a special Provision for their Protection, and a Power to appoint Life Interests to Husbands. —Provisions for Maintenance and Advancement of Infant Legatees generally.—Annuity to Wife marrying again.—Devise of Mortgage and Trust Estates.—Power to give Receipts and appoint Trustees.—Appointment of Executors and Guardians.

THIS IS THE LAST WILL AND TESTAMENT of me, [*testator's name, residence and quality*]. I DEVISE all the freehold hereditaments in the parish of —, in the county of —, to which I am entitled at the date of this my will (in exclusion of any hereditaments in the said parish which I shall acquire subsequently to that date), with their actual and reputed appurtenances, To such persons, for such estates, and in such manner as my eldest son [*name*], shall by any deed or writing, not testamentary, appoint; And in default of appointment, To him and his assigns for his life, without impeachment of waste; with remainder, on the determination of his estate in his lifetime, To my executors and administrators during his life, in trust for him and his assigns; with remainder to him in fee simple. I DEVISE my freehold closes, called —, containing respectively —, or thereabouts, situate at —, with their actual and reputed appurtenances, to my wife [*name*], for her life, without impeachment of waste; with remainder To my sons and daughters [*names*], in equal shares, as tenants in common in fee-simple, with cross executory limitations of the shares, original and accruing, of such of them as shall die under the age of twenty-one years without having married [*or, without leaving issue*], to the others, in equal shares, as tenants in common, or to the other of them, in fee-simple; And I limit the shares, original and accruing, of each son, to such persons, for such estates, and in such manner as he shall by any deed or writing, not testamentary, appoint; And in default of appointment, To him for his life, without impeachment of waste; with remainder, on the determination of his estate in his lifetime, To my executors and administrators during his life, in trust for him and his assigns; with remainder To him in fee simple; And the shares, original and accruing, of each

Devise to uses to prevent dower in favour of the testator's son.

Devise to testator's children in common in fee with cross executory devises; the shares of sons to uses to prevent dower, and of daughters for their separate use, with a testamentary power of appointment, and a clause avoiding the gift to daughters on alienation of their life interests.

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Devise to trustees for the life of testator's married daughter, for her separate use, subject to ceaser on alienation—to her husband for life—to her children attaining twenty-one, or dying under twenty-one, leaving issue, in fee—to sons of testator in common in fee.

daughter, to my executors and administrators, for her life, without impeachment of waste, UPON TRUST to pay the rents and profits thereof, as and when the same shall become due, and not by way of anticipation, into her own hands, to be enjoyed by her as an inalienable personal provision, free, whensoever she shall be covert, from all control and engagements of her husband; and for such rents and profits her receipts alone shall be sufficient discharges to my trustees; with remainder To such persons, for such estates, and in such manner as she, whether covert or discover, shall by any testamentary writing appoint; And in default of appointment, To her in fee-simple; AND I DECLARE that if, during the life of my same daughter, the rents and profits of her share or shares, or any part thereof, shall, from any cause whatever, cease to be payable into her own hands, to be enjoyed as aforesaid, Then all the dispositions in her favour hereinbefore contained shall be void, and the devise lastly hereinbefore contained shall thenceforth take effect in the same manner as if such daughter had never existed as an object thereof. I DEVISE the freehold messuage and lands, which, at the date of this my will, constitute the farm called — farm, situate in the parish of —, in the county of — (in exclusion of any lands of mine which subsequently to that date shall answer the same description), with their actual and reputed appurtenances, to [trustees], their executors and administrators, during the life of my daughter [name], the wife of [name], without impeachment of waste, UPON TRUST to pay the rents and profits thereof, as and when the same shall become due, and not by way of anticipation, into her own hands, to be enjoyed by her as an inalienable personal provision, and, while covert, free from the control and engagements of her husband; for which rents and profits her receipts alone shall be sufficient discharges to my executors and administrators; And I declare that if, at any time during the life of my last-mentioned daughter, the rents and profits of the same hereditaments, or any part thereof, shall, from any cause whatever, cease to be payable into her own hands, to be enjoyed as aforesaid, then the trust lastly hereinbefore contained in her favour shall thenceforth be void, and the same rents and profits shall, during the then remainder of her life, be paid to the person or persons who would for the time being be entitled to receive the same if my same

daughter were dead; with remainder To her husband, the said [name], for his life, without impeachment of waste; with remainder To the child, if only one, or the children, if more than one, of my last-mentioned daughter, in fee-simple, such children, if more than one, to take as tenants in common in equal shares; with cross executory limitations of the shares original and accruing of such of them as shall die under the age of twenty-one years without leaving issue to the other or others in fee-simple, and if more than one as tenants in common in equal shares; But if there shall not be any child of my same daughter who shall attain the said age, or shall die under that age and (a) leave issue living at his or her death, Then to such persons, for such estates, and in such manner as my same daughter, whether covert or discover, shall by any testamentary writing appoint; And in default of appointment, to my sons [names], in fee-simple, as tenants in common in equal shares. I DEVISE all my freehold hereditaments at —, in the county of —, which were purchased by me from [name and description of vendor], and were conveyed to me by indentures of lease and release, dated respectively the — and — days of —, in the year —, To my son [name], and his assigns, for his life, without impeachment of waste; with remainder to [name], the wife of my same son, and her assigns, for her life,

Devise to testator's son for life—remainder to son's wife for life—to their issue, as they or the survivor shall appoint—to their children and issue per

(a) In these and similar limitations great care is necessary in the use of the conjunctions “and” and “or;” difficulties are continually arising from their indiscriminate application, and accordingly we find the Courts have often been called upon to rectify blunders of this nature. It would seem that, to induce the Courts to read “or” for “and,” or *vice versâ*, there must be shown some sort of necessity, something beyond mere probability that the testator's own words do not indicate his real intention. The change must be made for the purpose of correcting a palpable mistake; or of avoiding an absolute absurdity; or of reconciling a contradiction or clear inconsistency; or of escaping from an uncertainty or ambiguity; or otherwise of giving effect to an indisputable intention—and cannot be made if any reasonable construction can be put upon the testator's words as they stand (*Re Hopkins's Trust*, 2 H. & M. 411, 415).

“And” and “or.”

The cases on this subject are collected, 1 Jarm. Wills, 471—486; and the following authorities may also be referred to:—Co. Litt. 225, a; 8 Vin. Abr. 210, pl. 4; *Re Walton's Estate*, 8 D. M. & G. 173; *Johnson v. Simcock*, 7 H. & N. 344, affirmed 9 W. R. 895; *Coates v. Hart*, 32 Be. 349; *Barker v. Young*, 33 Be. 353; *Cooke v. Mirehouse*, 34 Be. 27; *Re Kirkbride's Trusts*, L. R., 2 Eq. 400.

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—
 stirpes in fee
 [or, to their
 children in
 fee, with
 cross execu-
 tory devise:]
 —to the sur-
 vivor of the
 son and his
 wife in fee.

without impeachment of waste ; with remainder To all, or any one or more, exclusively, of the children and more remote issue of my same son (such issue coming into being in the lifetime of my same son and [name] his wife, or the survivor of them) for such estate or estates, in such shares, subject to such limitations, and in such manner in all respects as my same son and his said wife, or the survivor of them, by any deed or deeds, with or without power of revocation and new appointment, or as such survivor, by any testamentary writing, shall appoint ; And in default of appointment, To the child, if only one, or the children, if more than one, of my same son, in fee-simple, and if more than one, to take as tenants in common in equal shares ; And if any of such children shall die under the age of twenty-one years, without leaving issue living at his, her, or their death or respective deaths, then as to as well the share hereinbefore limited to each child so dying, as the share or shares limited to such child by this executory limitation, To the other, if only one, or the others, if more than one, of the children of my same son, in fee-simple, and if more than one, to take as aforesaid ; But in case there shall not be any child of my same son, or not any such child who shall attain the age of twenty-one years, or die under that age and leave issue living at his or her death, To the survivor of them, my same son and his said wife, in fee-simple. I DEVISE all the manors, messuages, lands and hereditaments in the county of —, to which I shall be entitled at my decease, with their appurtenances, To my first son, for his life, with remainder To the first son of my first son in fee-simple, And if such first son of my first son shall die under the age of twenty-one years, without leaving issue [male] living at his death, To the second and every subsequent son of my first son successively, according to seniority, in fee-simple, so that the estate of such second and each subsequent son shall, in the event of his death under the age of twenty-one years, without leaving issue [male] living at his death, be divested and go over to his next brother ; But if there shall not be any son of my first son, or not any who shall attain the age of twenty-one years, or die under that age and leave issue [male] living at his death, then to the daughter or daughters of my first son in fee-simple, and if more than one, as tenants in common, in equal shares ; And if any of such daughters shall die under the age of twenty-one years,

Devise to tes-
 tator's first
 son for life—
 to the sons
 of such son
 successively
 in fee, by
 way of exe-
 cutory devise
 —to the
 daughters in
 common in
 fee—to tes-
 tator's second
 and other
 sons, and
 their sons
 and daugh-
 ters, in like
 manner.

without leaving issue living at her or their death or respective deaths, then, as to the share or shares, original and accruing, of the daughter or daughters so dying, To the other or others of the daughters of my first son in fee-simple, and if more than one, as tenants in common, in equal shares; And if there shall not be any daughter of my first son, or not any such daughter who shall attain the age of twenty-one years, or die under that age and leave issue living at her death, To my second and every subsequent son, for his life; with remainders To his sons and daughters, corresponding with the remainders hereinbefore limited to the sons and daughters of my first son; but so that every elder of my second and subsequent sons, and his sons and daughters, shall be preferred to every younger of my same sons, and his sons and daughters; And if there shall not be any child of any of my sons, or not any such child who shall attain the age of twenty-one years, or die under that age and leave issue living at his or her death, then to my own right heirs. I DEVISE all the freehold hereditaments at —, in the county of —, which I lately purchased from the devisees in trust of [name], with their actual and reputed appurtenances, TO THE USE of my wife [name] and her assigns during her life, if she shall continue my widow, without impeachment of waste; And, after her decease or marrying again, TO THE USE OF [names, &c. of trustees], their heirs and assigns, upon the trusts hereinafter contained concerning the residue of my freehold estate. I DEVISE the residue of the freehold estates, and all the leasehold estates to which I shall be entitled at my decease, unto and to the use of the said [trustees], their heirs, executors, administrators and assigns respectively, UPON TRUST to sell the same, together or in parcels, by public auction or private contract, at such place and time, and subject to such stipulations relative to the title, or the evidence of title, or to the time or mode of payment of the purchase-money, (part whereof may be allowed to remain on mortgage of all or any part of the estates sold), or to any other matters connected with the sale, as my trustees shall judge expedient, or as their counsel shall advise, with full discretion and authority to sell, either subject to or discharged from, or with an indemnity (by impounding part of the purchase-money or otherwise) against, any incumbrances, and also to fix reserved biddings, and buy

Devise of lands to wife during widowhood—remainder to trustees, upon the trusts after declared of the other real estate.

Devise of the testator's other freehold estates and his leasehold estates to trustees, upon trust to sell, with an extensive discretion as to the mode and terms of sale.

Prec. XIX.

Power of trustees to concur with wife in selling the dwelling-house, &c. devised to her during widowhood.

Power to postpone the sale of the real estates, and in the meantime to let and manage, &c.

Trustees to receive the rents till sale.

Real estates till sold to be considered as personal.

in any lot or lots at any auction, and to rescind or vary, either on terms or gratuitously, any contract for sale, without being liable for any consequential loss, and also to execute such instruments and assurances as shall be requisite for effecting and completing the sale of my said estates; and I direct that the money to arise from the sale of my said estates shall be received by my trustees and be disposed of in manner hereinafter expressed. I DECLARE that my trustees shall be at liberty to concur (b) with my said wife in any arrangement for selling the fee-simple in possession of the hereditaments hereinafter devised to her during widowhood, and for apportioning the purchase-money according to the respective values of her particular estate and the remainder in fee, or for investing the produce in or upon any of the securities hereinafter authorized with respect to my residuary personal estate, and permitting her to receive the income of such produce and the investments thereof during her life, if she shall continue my widow; but, otherwise, such hereditaments shall not be sold till the determination of her particular estate. I DECLARE that my trustees shall be at liberty to postpone the sale of my said trust estates, or any of them, until the produce shall become distributable under the trusts hereinafter contained, or for any shorter period, if such postponement shall appear to them to be advantageous; and that, during the suspense of the sale of my said trust estates, or any of them, my trustees shall have full power to let the same from year to year, or for any term not exceeding [seven] years in possession, at the best rent, or, at their option, to take possession thereof and manage and improve the same, and for that purpose to employ agents, bailiffs and servants, and expend a competent part of my trust moneys, and shall also have full power to cut and sell timber. I DECLARE that the rents and profits of my trust estates from time to time remaining unsold shall be received by my said trustees, and be applied in the same manner as the income of the produce of such estates, if sold, would be applicable. I DECLARE that, notwithstanding the postponement of the sale of my said trust estates,

(b) See Co. Litt. 113 a, n. (2); Sugd. Pow. 266; *Mills v. Dugmore* (30 Be. 104), in which, upon the words of the trust for sale, a sale in the wife's lifetime was permitted with her consent.

or any of them, the same shall, for the purposes of enjoyment and transmission, be considered as converted in equity from the time of my decease, but without prejudice to the right of the person or persons becoming absolutely entitled to the entire produce thereof to treat the same as unconverted and require a conveyance thereof. I WILL that my copyhold estates shall, so far as the tenure thereof will permit, be disposed of according to the trusts and declarations hereinbefore contained concerning my said residuary freehold estates; and, for the greater convenience of performing such my will, I DEVISE the same copyhold estates to such uses as my trustees shall by any deed or deeds, to be executed within twenty-one years from my decease, appoint, in order to complete any sale or sales to be made pursuant to my will (c); And in default of appointment, TO THE USE of the said [trustees], their heirs and assigns, to be held upon and subject to the trusts and declarations aforesaid. I DECLARE that, notwithstanding the trust for sale hereinbefore contained, my trustees shall permit my said wife [name] to have the use and occupation of the freehold messuage or dwelling-house, with the offices, gardens, orchards, pleasure-grounds and lands belonging thereto, at — aforesaid, which at the date of this my will are in my own occupation (in exclusion of any hereditaments of mine which, subsequently to that date, may be occupied by me), as her residence, so long as she shall think fit to reside therein, and shall continue my widow, she keeping the same insured against fire to the full value thereof [or, to three-fourths of the value thereof], in the names of my trustees, and also keeping the same in tenantable

Copyhold estates subjected to the same trusts, and devised to such uses as the trustees shall appoint, and, in default of appointment, to them in fee.

Trustees to permit wife to reside in dwelling-house, &c. during widowhood.

(c) Under the old law an unadmitted heir could devise copyholds, but an unadmitted devisee or surrenderee could not. By sect. 3 of the Wills Act, *ante*, pp. 3—5, either the heir or devisee or surrenderee is empowered to devise before admittance.

Copyholds devisable before admittance.

In the text, the copyholds are excluded from the devise of the freeholds and leaseholds, in order that a common-law power of sale and disposition may be vested in the trustees, by the exercise of which they may entitle a purchaser to admission without being themselves admitted. See also 2 Hayes, Conv. 80; 9 Jarm. Byth. 426; 3 Dav. Mart. 320 (c); and note (b) to Prec. V., *ante*, p. 118. The restriction of the power to the period of twenty-one years is obviously to avoid infringing the rule against perpetuities, as to which, see *post*, p. 297.

Power to sell copyholds.

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Sale of dwelling-house suspended during wife's residence.

Bequest to wife of various moveables, with power to trustees to determine the extent of the bequest.

Pecuniary legacy to wife.

Bequest of plate to trustees, upon trust to permit wife to have the use ;

an inventory to be made.

repair, and paying the taxes and other outgoings affecting the same ; AND I DIRECT that the trust for sale of the last-mentioned premises shall be suspended until the right of my said wife to the use and occupation thereof shall determine. I GIVE to my said wife, for her absolute use, the carriage and carriage-horses, with the harness and other appendages thereto respectively belonging, of which I shall be possessed at my decease ; also the implements and utensils, stock of hay, corn and straw, and other moveable effects which shall be used or employed in or about my coach-house and stables at my decease ; also the gardening implements and utensils, greenhouse and hot-house furniture, pots, plants in pots and other moveable effects which shall be used or employed in or about my gardens and pleasure-grounds at my decease ; also the household furniture, books, pictures, prints, china, glass, linen, wine, liquors, fuel, house-keeping stores and provisions, and other moveable effects of the like nature, which shall belong to me at my decease, for her absolute use ; And I empower my trustees to decide conclusively, in case of dispute, what articles the last bequest shall be deemed to comprise. I GIVE to my said wife, for her use, the sum of £ —, to be paid or retained out of the first moneys which shall be received from my estate. I GIVE all the plate which shall belong to me at my decease unto the said [*trustees*], UPON TRUST to permit my said wife, so long as she shall continue my widow, to have the personal use and enjoyment thereof ; And, subject to the trust aforesaid, IN TRUST for such child or children of mine, as, either before or after the determination of the preceding trust, shall, being a son or sons, attain the age of twenty-one years, or, being a daughter or daughters, attain that age or be married ; and if more than one, to be divided between them, in shares as nearly equal as may be, by my trustees, whose division shall be conclusive : And I direct my trustees, as soon as may be after my decease, and before the delivery to my said wife of the said plate, to cause an inventory thereof to be taken, and two copies to be made of such inventory, and to be signed by my trustees and by my said wife, one copy to be kept by her, and the other by my trustees ; but my trustees shall, after the signature of such copies, and the delivery to my said wife of the said plate, be exempt from all responsibility in respect of such plate

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during her widowhood. I BEQUEATH the residue of the personal estate to which I shall be entitled at my decease unto my said trustees, UPON TRUST to sell, convert, collect and get in the same, and receive the money to arise therefrom, with full authority to compound debts, submit differences to arbitration, give receipts, execute releases, and do or concur in all acts and arrangements for realising my estate, or settling my affairs, according to their discretion. I DECLARE that if any real or personal estate hereinbefore directed to be sold or converted shall consist of reversionary, future or contingent interests, my trustees shall be at liberty, in their discretion, either to wait the falling in or the vesting of such interests, or to sell the same, or to concur with the person or persons entitled to the prior interest or interests in any arrangement for dividing the corpus of the property, or for selling or converting the same, and for apportioning the produce according to the value of the respective interests, or otherwise providing for such interests (*d*) I DECLARE that my trustees shall have full discretionary power to permit any part of my personal estate which shall at my decease consist of life annuities, or other determinable interests, or of mortgages, stocks, funds, shares in public companies, or securities, including personal securities, or any other species of investment yielding interest or income, to remain in the same state of investment, for such period or periods as my trustees shall think fit. I DECLARE that the actual yearly produce of my said freehold, leasehold and copyhold estates, and of my residuary personal estate respectively, until the sale and conversion thereof respectively, shall be considered as the income thereof, for the purposes of the trusts and provisions hereinafter contained, and be applied accordingly, whether the same shall be more or less in amount than the produce or value of the estates would have yielded, if invested conformably to the trusts for investment herein contained, and so that nothing shall be placed, on the one hand, to the account of capital, in

Bequest of residue of personal estate to trustees upon trust to convert, with power to compound debts, &c.

Power to trustees to defer the sale of reversionary and contingent interests.

Power to trustees to continue determinable investments.

The actual yearly produce of the real and personal estate, whether more or less than the rule of equity allows, to be deemed income.

Reversionary interests.

(*d*) This clause is adapted to the case of a testator whose property consists partly of reversionary interests, the immediate sale of which, under an absolute trust for conversion, might be attended with great disadvantage to the estate. Hence the expediency of giving trustees a discretion in this particular. See *ante*, pp. 246—252.

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[Or, Power to trustees to determine the rights of tenant for life and reversioner, in regard to capital and income.]

Trusts of the produce of the real estate and residuary personal estate ;

—to invest in the funds, or on real securities ;

—to permit wife to receive income during widowhood ;

—capital for testator's

respect of the proceeds arising from determinable or extraordinary investments, or, on the other hand, to the account of income, in respect of reversionary or contingent interests or other unproductive investments, any rule of equity to the contrary notwithstanding. [Or, I DECLARE that, in the meantime, until the conversion and investment of my real and personal estates pursuant to the trusts hereinbefore contained, my trustees shall have full discretionary power to adjust and determine all rights and equities, as between tenant for life and reversioner, or otherwise, in regard to capital and income, upon such principles, and in such manner, as to my trustees shall seem just and reasonable, with liberty to apply as income the whole amount of the actual proceeds and profits of such real and personal estate, or any part thereof, or to apply as income part only of such proceeds and profits, and invest the residue thereof as capital, but so that the income to be received by the tenant for life shall not be less than the rules of equity allow (e).] As to as well the money (not applicable as income under the direction hereinbefore contained) to arise from my residuary personal estate, as the money to arise from the sale of my freehold, leasehold and copyhold estates, UPON TRUST, with the consent in writing of my said wife, during her life, if she shall continue my widow, and, after her decease or marriage, in the discretion of my trustees, to invest the same in their names in or upon the public funds, or Government or real securities, including copyhold and leasehold securities, in the United Kingdom, such leasehold securities having not less than sixty years unexpired at the times of the investments thereon respectively, but not in or upon any other investments ; AND UPON FURTHER TRUST to permit my said wife to receive the income of the trust fund constituted of such moneys, or of the investment thereof, during her life, if she shall continue my widow ; And after the determination of that trust, as to the principal of the said trust fund, with the future income thereof, IN TRUST for my child, if only

Adjustment of equities between tenant for life and reversioner.

(e) Where a testator's property is of great extent and variety, the investing of trustees with a discretionary power of this kind seems to offer the best, and perhaps the only effectual, mode of avoiding the difficulties and questions likely to arise on the application of the doctrine discussed in a previous note. See note (c) to Prec. XVI. *ante*, p. 246.

one, or for my children, if more than one, in equal shares, and so that the interest of a son or sons shall be absolutely vested at the age of twenty-one years, and of a daughter or daughters at that age or marriage, whether the preceding trust shall be determined or not, and so that the share or shares, as well accruing as original, of a son or sons dying under the age of twenty-one years, and of a daughter or daughters dying under that age without having been married (*f*), shall accrue to the other or others of my said children, and if more than one in equal shares, and be vested as aforesaid; nevertheless, as to the shares of daughters, subject to the trusts hereinafter contained; But if there shall not be any object of the preceding trust who shall acquire an absolutely vested interest, UPON TRUST to dispose of one moiety of the said trust fund, to or for such persons and purposes, and in such manner as my said wife, if she shall continue my widow, shall by her last will appoint [*or*, UPON TRUST to raise and pay out of the said trust fund such sum or sums of money, not exceeding in the whole the sum of £ —, as my said wife, if she shall continue my widow, shall by her last will direct, to and for such persons and purposes and in such manner as she shall thereby direct]; and as to the

children
equally, with
benefit of
accruer.

Ultimate
trust, as to a
moiety [*or*,
as to a
limited sum]
for such per-
sons as wife
shall by will
appoint;
and, subject
to such
power, the
whole for
testator's
brothers and
sisters, and
their issue
living at tes-

(*f*) There is an ambiguity in the use of the word “unmarried” which has been the cause of frequent litigation. The ordinary meaning of the word is “never having been married;” the less accustomed meaning is “not being married at the time in question.” It would seem that the word is to be construed in one sense or the other according to the particular circumstances of each case (see *Maugham v. Vincent*, 9 L. J., N. S., Ch. 329; 4 Jur. 452), a doctrine which, supposing the first construction rejected, still leaves room for dispute as to the particular epoch to which the testator intended the word “unmarried” to refer (see *Hall v. Robertson*, 4 D. M. & G. 781). If, however, a person is once entitled as “unmarried,” a subsequent marriage does not deprive him of his right. In many settlements the word “unmarried” is used only for the purpose of excluding the marital rights of a husband, the intention being to exclude him only, and not any class of next of kin: see *Pratt v. Mathew* (22 Be. 328; 8 D. M. & G. 522); *Mitchell v. Colls* (Joh. 674), affirmed nom. *Clarke v. Colls* (9 H. L. C. 601); *Wilson v. Atkinson* (4 N. R. 451); *Re Sanders' Trusts* (L. R., 1 Eq. 675).

“Unmar-
ried,” mean-
ing of.

Refer also to 1 Jarm. Wills, 486; *Reg. v. Inhabitants of Wymondham*, 2 Q. B. 541; *Re Thistletwayte's Trust*, 3 W. R. 466, 629; *Blagrove v. Coore*, 27 Be. 138; *Heywood v. Heywood*, 29 Be. 9; *Day v. Barnard*, 1 Dr. & S. 351.

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tator's [or
wife's] death
per stirpes.

said trust fund, subject to the power lastly hereby given to my said wife, IN TRUST for such of the class of persons following, (namely), my brothers and sisters living at my death [or, at the marriage or death of my wife], and the issue then living of my brothers and sisters dying in my lifetime [or, dying in my lifetime, or during the widowhood of my wife], as being males shall attain the age of twenty-one years, or being females shall attain that age or be married, distributively, yet so that the issue shall participate only as representing their deceased parents.

Widows and
issue of sons,
and issue of
daughters,
dying in tes-
tator's life-
time, to suc-
ceed to the
shares of the
deceased.

I DECLARE that if any child of mine, being a son, and having attained the age of twenty-one years, shall die in my lifetime, leaving a widow, or a child or children, or both, living at my decease, or if any child of mine, being a daughter, and having been married with my consent, shall die in my lifetime, leaving a child or children living at my decease, then the fund or share which, under the aforesaid trust in favour of my child or children would have belonged to the child of mine so dying, if such had lived to become an object of, and acquire an absolutely vested interest under the same trust, shall be held by my trustees upon trusts, and subject to provisions in favour of the widow or the child or children, or in favour of the widow and child or children, as the case may be, of the child of mine so dying, corresponding with the trusts and provisions herein contained of and with respect to the said trust fund constituted as lastly aforesaid in favour of my wife or child or children, or of my wife and child or children, as the case may be, and on failure of such trusts and provisions shall be disposable in the same manner as if this declaration had not been inserted (g). I

Trusts of ori-

As to pro-
viding
against lapse.

(g) Wills are commonly framed upon the assumption that the state of circumstances existing at the time of execution will remain unchanged until the testator's decease; hence the infrequency of any provision against lapse. It is true, that the event of the gift lapsing would, in most cases, be best met by a new will or a codicil, adapted to the change of circumstances; yet, as the testator may be prevented from revising his disposition or be unapprised of its partial failure, a prospective provision, if it should not be exactly suited to the exigency, may still obviate much of the inconvenience and hardship of the case. For instance, it sometimes happens that one of the objects of the testator's bounty dies, leaving issue, upon whom the testator might wish to confer the benefit intended for their parent; his death may happen when the testator is *in extremis*, so as to be incapable of altering his will, or may happen at a remote distance from

DECLARE that my trustees shall retain the fund, or the share or shares, original and accruing, to which each or any

ginal and accruing shares of daughters;

the testator, so that tidings of the event do not reach him before his own death. The case, however, of issue of the testator himself dying in his lifetime, and in his will referred to by name (or otherwise individually and not as one of a class), is now provided for; see 1 Vict. c. 26, s. 33, *ante*, p. 56. The testator and his legatee may die under circumstances which raise the nice and difficult point respecting probable or presumed survivorship, as where they both perish on board a ship foundering at sea. See *Mason v. Mason* (1 Mer. 308); *Underwood v. Wing* (4 D. M. & G. 633).

Lapse.

Whether words providing against the death of devisees or legatees apply to the event occurring in the lifetime of the testator, or at any and what subsequent period, is a question which has been frequently discussed and variously decided. One class of such cases relates to bequests simply to A., and, in case of his death, over; raising the question, therefore, whether these words are to be construed as synonymous with "at or after" the death which would cut down the interest of the legatee to whose death reference is made, to an interest for life; or whether death is to be combined with some other circumstance, in order to satisfy the terms of contingency applied to it, death being in itself a certain and inevitable event. The contingent construction has prevailed, and, in adopting it, the obvious course is to consider the uncertainty contemplated by the testator as referring to the time of death; a point which is easily disposed of when the gift, being simply to take effect in possession at the testator's decease, presents no other period to which the words in question can be referred (*Longfield v. Stoneham*, 2 Stra. 1261; *Hinchley v. Simmons*, 4 Ves. 160; *King v. Taylor*, 5 Ves. 806; *Cambridge v. Rous*, 8 Ves. 12; *Webster v. Hale*, Id. 410; *Ommaney v. Bevan*, 18 Ves. 291; *Wright v. Stephens*, 4 B. & Al. 574). But see *Billings v. Sandom*,¹ 1 Br. C. 393; *Nowlan v. Nelligan*, Id. 489; *Lord Douglas v. Chalmer*, 2 Ves. j. 501; *Chalmers v. Storil*, 2 V. & B. 222; *Crigan v. Baines*, 7 Sim. 40. But this construction seems to be confined to such cases; for it has been held, that, where the will supplies a period of distribution subsequent to the death of the testator, the words are referable to that period (*Hervey v. M^cLaughlin*, 1 Pri. 264; *Whitton v. Field*, 9 Be. 368; *Girdlestone v. Doe*, 2 Sim. 225). In *Edwards v. Edwards* (15 Be. 357), the construction of gifts of this nature was stated to be as follows: a gift to A., and, if he shall die, to B.; the contingency has reference to the death of the testator: a gift to A., and if he shall die without children, to B.; the contingency has reference to the death of A.: a gift to Z. for life, with remainder to A., and if he shall die, to B.; or, a gift to Z. for life, with remainder to A., and if he shall die without leaving children, to B.; in either case, the contingency has reference to the death of Z. the tenant for life. See also *Dean v. Handley* (2 H. & M. 635); *Hawkins, Constr. Wills*, 254, *et seq.* It is well established, that if a testator devises or bequeaths property to A., and in case of his death under

Words providing for death of objects, to what period referable.

Prec. XIX.

—income to

daughter of mine acquiring an absolutely vested interest shall become entitled by virtue of my will, UPON TRUST to pay the

Words providing for death of objects;

the age of twenty-one years to B., the gift to B. will take effect in the event of A. dying under the prescribed age, either in the lifetime of the testator or afterwards (*Miller v. Warren*, 2 Ver. 207; *Willing v. Baine*, 3 P. W. 113; *Doo v. Brabant*, 3 Br. C. 393; *Humberstone v. Stanton*, 1 V. & B. 385; *Williams v. Jones*, 1 Rus. 517). And it would not, it seems, be conclusive against this construction, that the gift over purported to dispose of the "share" or "legacy" of the prior devisee or legatee, who could not, strictly speaking, be an object of gift until the testator's decease (*Humphreys v. Howes*, 1 R. & M. 639; *Walker v. Main*, 1 J. & W. 1; *Harris v. Davis*, 1 Col. 416).

—when not referable to death in testator's lifetime.

In some instances, however, words expressly pointing at the death of the legatee have been construed to apply exclusively to such event occurring after the testator's decease; the postponement of payment affording a period subsequent to the death of the testator, to which they could be referred. Thus, if a testator bequeaths property to A. for life, and after his decease to his children, and provides, that, in case of the death of any of the legatees before their legacies become payable, then the legacy of each so dying shall go to his executors or administrators; these words will be construed as embracing the event of any of the children dying in the interval between the testator's death and the death of A., and not as disposing of the legacies failing by lapse (*Corbyn v. French*, 4 Ves. 418; *Bone v. Cook*, M'Cl. 138). These cases, however, seem to form a distinct class, and may, it is conceived, be regarded as exceptions to the general rule already stated.

A testator gave his residuary estate to trustees, in trust for his mother for life; after her decease, in trust for all the younger children of his two sisters, to be vested interests at twenty-one, with the usual provisions for the others or other of the said children in case of the death of any under twenty-one. He then made provision for maintenance by directing the trustees to pay the interest of the presumptive share of any child during minority to its mother. It was held by Lords Commissioners *Pepys* and *Bosanquet*, that the fund went to the children living at the death of the tenant for life, those dying under twenty-one having defeasible interests (*Berkeley v. Swinburne*, 16 Sim. 275).

See, as to lapse, *Elliot v. Davenport* (1 P. W. 83), in Tud. L. C. R. P. pp. 803—818.

Questions as applied to gifts to classes.

Clauses of substitution.

Gifts to classes of persons who are not ascertainable until the death of the testator, impose the necessity of particular care in preparing clauses which are intended to dispose of the shares of members of the class dying in the testator's lifetime; for, as persons so dying are not objects of the preceding gift, they are not within the clauses in question, if construed strictly as substitutional. Thus, where a testator bequeathed a sum of money owing to him by A. to the younger children of A., to remain in A.'s

income thereof, as and when the same shall become due, and not by way of anticipation, into the proper hands of my same

daughter for
life—sepa-
rate use.

hands until the children should be capable of receiving it, and the legacy or share of any of them dying before such time to go to the survivors and survivor of them, it was considered that this must be intended, if the legatee should have survived the testator; but that, where the legatee died in the lifetime of the testator, as nothing could vest in the legatee, so neither could it survive from him (*Rider v. Wager*, 2 P. W. 331). So, where a testator gave the residue of his estate to the children of his brother A., and of his late brother and sister B. and C., who should be living at the decease of A. and his wife, in equal proportions; and as to such of them as should be then dead, leaving a child or children, such child or children was or were to be or stand in the place of his, her, or their parent or parents; it was held that the bequest was confined to the children of such of the legatees as survived the testator and afterwards died before the time of distribution; and that the children of those who died in the testator's lifetime were not entitled to participate (*Butter v. Ommaney*, 4 Rus. 70). In several recent cases, a strong disposition has manifested itself to extend clauses disposing of the "shares" of persons dying before the period of distribution to those who die in the testator's lifetime, though the preceding gift is to a class of objects (as children) not ascertainable until the testator's decease, and therefore, it might seem, having no "share" or interest upon which the clause in question can operate (*Willing v. Baine*, 3 P. W. 113; *Walker v. Main*, 1 J. & W. 1; *Humphreys v. Howes*, 1 R. & M. 639; *Smith v. Smith*, 8 Sim. 353). In another case even the children of a person who had died previously to the making of the will were held to be entitled; there being a substantive original gift to the children of deceased objects concurrently with the living objects, and not a mere clause of substitution (*Tytherleigh v. Harbin*, 6 Sim. 329). Indeed, in several subsequent instances, clauses of substitution, though in terms applicable to future events, have been extended, to let in the issue of persons who were dead when the will was made, the conclusion from the whole will being that the testator intended to embrace such objects (*Giles v. Giles*, 8 Sim. 360; *Jarvis v. Pond*, 9 Sim. 549; *Loring v. Thomas*, 1 Dr. & S. 497; and see *Bull v. Jones*, 10 W. R. 820).

Lapse; gifts
to classes;
substitution.

The result appears to be, that if there is a gift to children living at a definite time, and a substitutionary gift to issue, all the children living at the date of the will must be taken into account, whether they die in the testator's lifetime or not; and no other grandchildren take except those who are children of children alive at the date of the will (*Butter v. Ommaney*, 4 Rus. 70; *Christopherson v. Naylor*, 1 Mer. 320; *Re Thompson's Trusts*, 2 W. R. 218, affirmed, 5 D. M. & G. 280); but if there is a gift to children living at a definite time, and a distinct gift to the issue of children dying before that time, with a proviso that the issue shall take only their parents' share, then, notwithstanding the proviso, and notwith-

Conclusion
deduced from
the cases.

Prec. XIX.

Cesser and gift over of income, if trust for daughter's separate use shall be frustrated.

[*or*, power enabling trustees to declare other trusts in the same event];

daughter, to be enjoyed by her as an inalienable personal provision, free, whensoever she shall be covert, from the control and engagements of her husband, for which income her receipts alone shall be sufficient discharges to my trustees. AND I DECLARE that if, during the life of my same daughter, the same income, or any part thereof, shall, from any cause whatever, cease to be payable into her own hands, to be enjoyed as aforesaid [*or*, if by reason of any act or default of my same daughter, or of any husband whom she may marry, or by act of law, the intent hereinbefore expressed, that she shall enjoy the said annual income as a separate and inalienable personal provision, shall be frustrated], the trust lastly hereinbefore contained shall thereupon be void, and my trustees shall, during the remainder of the life of my same daughter, apply such income to or for the benefit of such object or objects for the time being of the trusts hereinafter contained concerning the same trust fund, at such times, and if more than one, in such proportions, and generally in such manner as my trustees shall, in their absolute and uncontrolled discretion, think fit; [*or*, then it shall be lawful for my trustees, at any time during the life of my same daughter, by any writing under their hands, to declare such trusts and purposes concerning the said annual income during the remainder of the life of my same daughter, in favour of my same daughter, or of any child or children or issue of my same daughter, or of any other child or children of mine, or of the issue of any such other child or children, or for the benefit of all or any of the objects aforesaid, as my trustees shall in their absolute and uncontrolled discretion think expedient; and immediately after such declaration shall be made, the trust lastly

standing that children dead at the date of the will take no share at all, all the grandchildren are let in; and the reason is, that the second clause is too obscure to abrogate and do away with the clear and substantive gift contained in the first clause (*Tytherleigh v. Harbin*, 6 Sim. 329; *Gaskell v. Holmes*, 3 Ha. 438). See also *Re Jordan's Trusts* (2 N. R. 57); *Re Chapman's Will* (32 Be. 382); *Re Potter's Trust*, V.-C. Malins, 5 Mar. 1869, where *Christopherson v. Naylor* was considered to be of no authority.

See also *Stewart v. Jones* (3 De G. & J. 532); *Coulthurst v. Carter* (15 Be. 421); *Ioe v. King* (16 Be. 46); *Re Faulding's Trust* (26 Be. 263); *Smith v. Pepper* (27 Be. 86); *Re Wood's Will* (31 Be. 324); *Jones v. Frewin* (3 N. R. 415); *Phillips v. Phillips* (5 N. R. 102); *Attwood v. Alford* (L. R., 2 Eq. 479); *Hawkins*, Constr. Wills, 243—252.

hereinbefore contained shall cease and be void]; And, after the decease of my same daughter, then, as to the principal with the future income, IN TRUST for all or any of the issue of my same daughter, including grandchildren and more remote issue born in her lifetime, for such interests, in such proportions and in such manner in all respects as my same daughter shall, by deed executed in the presence of and attested by one or more witness or witnesses, or by will, appoint; And, in default of such appointment, IN TRUST for the child if only one, or for all the children equally if more than one, of my same daughter, so that the interest or interests of such child or children shall be absolutely vested at the age of twenty-five years, or such earlier age as such child or children respectively shall happen to have attained at the decease of the survivor of my children and grandchildren who shall be living at the time of my decease, and the expiration of the term of twenty-one years afterwards (*h*),

—capital for her children, or more remote issue, as she shall appoint;

—in default of appointment, for her children equally, with accruer; but so as to postpone the vesting beyond the usual period;

(*h*) After protracted litigation, the much agitated question respecting the true limits of the rule against perpetuities has been set at rest. The House of Lords, after great deliberation and calling to its aid the Judges, decided that a limitation of estate which postpones the vesting for a life in being (including, by necessary consequence, any number of existing lives), and a further term of twenty-one years as an absolute term, independently of infancy, is valid (*Cadell v. Palmer*, 1 C. & F. 372). In the case before the House, the term of suspension happened to be twenty years only; but the Judges unanimously declared twenty-one years to be the allowed term; and they also negatived the allowance of a further absolute period for gestation, their opinion being “that the period of gestation was to be allowed only in those cases where gestation existed.”

Rule against perpetuities.

An infant *en ventre sa mère* is, for the purposes of this rule, regarded as a life in being; and cases may be suggested in which there would be a double allowance for gestation; as in the instance of a gift to such of the testator's grandchildren and great grandchildren as should be living at the expiration of twenty-one years from the decease of the survivor of his children. The testator might leave a child *en ventre*, and, at the expiration of twenty-one years, one of his grandchildren or great grandchildren might be also *en ventre*; by which means the time of gestation would be added (if indeed it can be termed an addition) at both extremities of the period of postponement.

Infant *en ventre sa mère* considered as an existing life.

The death of the testator, and not the date of his will, is to be considered with respect to the question of a devise being too remote (*Vanderplank v. King*, 3 Ha. 1; *Williams v. Teale*, 6 Ha. 239).

It is observable that a testator is not allowed a longer term of years on account of his not availing himself of a life; and, therefore, a gift which

Postponement for more than

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whether the preceding trusts be determined or not, and so that the share or shares, as well accruing as original, of a child or

twenty-one years, without a life, void.

postpones the vesting for an absolute period of twenty-one years and one day, without a life, is void, no less than one which suspends the vesting for a life and twenty-one years and a day (see *Palmer v. Holford*, 4 Rus. 403). In *Lachlan v. Reynolds* (9 Ha. 796) a gift at the end of thirty years was supported on the ground that it was ultimately to vest in persons living at the death of the testator and at the end of the thirty years, and the vesting must therefore take place, if at all, in the life of a person in being at the testator's death.

A gift over if there should be no child or other issue of a tenant for life who should survive the testator and the tenant for life is not void for remoteness, for the word "survive" means that the person to survive shall be living at the time of the event which he is to survive (*Gee v. Liddell*, 35 Be. 658).

Gift cannot be moulded according to the event.

In the application of the rule under consideration, it is an established principle, that a devise or bequest which exceeds the allowed limit cannot be moulded into consistency with the rule of law, because the events have turned out to be such as would have admitted of the gift being duly restricted; for the construction is to be made according to events which might have happened, and not according to events which have happened; and though it may be probable, that, if it had been proposed to the testator, that he should restrict his gift within such limits as the law requires, rather than, by a retention of his whole purpose, vitiate the entire disposition, he would have consented to abandon the illegal part of his scheme; yet, as he has expressed no such consent, the Courts have not assumed the power of acting upon the hypothesis. Thus, if real or personal estate is given to the eldest son of A. (who at the time of the testator's decease has no son), and in case such son shall die under the age of twenty-two, then to the second son of A., the latter gift is void, though A.'s eldest son should die under the age of twenty-one years, so that the ulterior gift, if confined within the allowed limits (i. e. if made to take effect in case the son had died under twenty-one), would in event have been effectual (see *Robinson v. Harcastle*, 2 Br. C. 22; *Cambridge v. Rous*, 8 Ves. 12; *Vandry v. Geddes*, 1 R. & M. 203; *Thomas v. Wilberforce*, 31 Be. 299). The rule is that a bequest or devise is void for remoteness, if it shall not of necessity take effect within the period of a life or lives in being at the testator's death, and twenty-one years afterwards. Upon the same principle, a gift to the person who for the time being shall be heir male of the body of A., and shall live to attain the age of twenty-one years, is void; though it may happen that the heir male of the body of A. who first attains majority was living at the testator's death: nor will the vice of remoteness be eradicated by a disposition of the profits until such heir should attain twenty-one (*Lord Dungannon v. Smith*, 12 C. & F. 546).

Alternative

However, it may, and often does occur, that a gift over is framed so as

children dying without having attained either of the alternative ages aforesaid, shall accrue to the others or other of such chil-

to take effect on a double contingency, one branch of which is within and the other is beyond the legal limit, which will therefore be good or bad according to the event. Thus, if a testator devises land to the first son of A. who should attain the age of twenty-two years, in fee, and if such son should die under the age of twenty-two years, or if A. should have no son, then to B. in fee; the gift to B. is precisely in this predicament. There are, it will be observed, two distinct devises to him; one to take effect if A. should have a son who should die under twenty-two, which is too remote, and is therefore void, whatever may happen to be the age at which such son dies; the other to arise in the event of A. having no son, which is good, as being necessarily to vest within a life in being. See *Leake v. Robinson*, 2 Mer. 363; *Crompe v. Barrow*, 4 Ves. 681; *Cambridge v. Rous*, 8 Ves. 12; *Minter v. Wraith*, 13 Sim. 52; *Re Thatcher's Trusts*, 26 Be. 365.

It would seem that on a bequest to persons *in esse* for life, and afterwards to their unborn children, with a general direction that female children should take for their "separate and inalienable use," the restriction against alienation would be too remote and would be void (*Armitage v. Coates*, 35 Be. 1). See also *Fry v. Capper* (Kay, 163).

An executory devise, however remote, may be engrafted on an estate tail; for such an estate being an estate of inheritance, and the owner thereof being competent to defeat the executory limitation and to alien the fee-simple, the rule against perpetuities has no place, such rule only requiring that the absolute estate or interest in the subject-matter of the limitation be not kept in suspense beyond the allowed period (*Nicolls v. Sheffield*, 2 Br. C. 215).

That a devise in tail after payment of debts is not too remote, see *Rimington v. Cannon* (12 C. B. 18). And a rent-charge by way of use, vested in an existing person and his heirs in fee-simple, but to commence at an uncertain future period, is not void for remoteness (*Gilbertson v. Richards*, 4 H. & N. 277, 5 H. & N. 453); and see Sugd. Pow. 15.

Consistently with the principle which forbids our having recourse to subsequent events in order to determine the validity of a devise, it is clear that a gift to a class extending to persons beyond the allowed line is void, although the class may happen to be entirely composed of individuals competent to have been objects of gift; for, as they claim in a collective character, the accidental circumstances of their respective situation cannot impart validity to their claim. Thus, if a gift is made to A. for life, and after his death to the children of A. who shall attain the age of twenty-two years, although all the children of A. who attain twenty-two should happen to have been born in the testator's lifetime (and who might therefore, as being persons *in esse*, have taken interests to vest at any age), yet the gift, not being confined to them, but embracing in its scope children born at any time during the life of A., whether in the lifetime or after the decease

gifts void in one event and good in another.

Restriction against alienation by married women.

Executory limitation after an estate tail not too remote.

As to gifts to classes which are too remote.

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dren, and if more than one in equal shares, and be vested as aforesaid; But no child in whose favour an appointment shall be

Rule against
perpetuities.

of the testator, is too remote, on account of the postponement of the vesting beyond the age of twenty-one years (*Arnold v. Congreve*, 1 R. & M. 209; *Newman v. Newman*, 10 Sim. 51; and see *Williams v. Teale*, 6 Ha. 251). The ordinary causes of the remoteness of gifts to children as a class are, that they either include the issue of unborn persons (*Burley v. Evelyn*, 12 Jur. 712), or defer the vesting of the shares of unborn children to an age later than majority. A testator is in less danger of overstepping the legal boundary, whilst providing for his own children and grandchildren, than when the objects of his bounty are the children or grandchildren of another; since he has only to avoid protracting the vesting of his grandchildren's shares beyond their ages of twenty-one years. If the vesting of a grandchild's share is postponed until the death of the survivor of its parents, the gift is too remote; since a child of the testator may marry a person born after the testator's death, and that parent may be the survivor (*Hodson v. Ball*, 14 Sim. 574; *Lett v. Randall*, 3 S. & G. 92; *Buchanan v. Harrison*, 1 J. & H. 662). But if the vesting be not postponed beyond majority, the extension of the gift to after-born grandchildren would not invalidate it, because all the children of a testator must be *in esse* at his decease, and their children must be born in *their* lifetime, which brings it within the compass of a life in being at the death of the testator. On the other hand, a gift embracing the whole range of the grandchildren of a living person, other than the testator himself, would be clearly void, though the vesting was to take place at majority, or even at the instant of birth, for the grandfather might have children born after the testator's decease; and as the gift would extend to the children of such after-born children, it would be too remote.

Gift to an
unborn per-
son taking
holy orders.

A gift to an unborn person, to take effect on his performance of an act which cannot be done until the attainment of an age posterior to majority, is clearly bad. Of this nature is a devise or bequest to the first unborn son of A. who shall take holy orders; for, as the canons of the Church of England require deacons to be twenty-three, and priests to be twenty-four, years of age, it follows that if A. should die, leaving a son under two years of age, the vesting would necessarily be deferred beyond a life in being and twenty-one years afterwards (*Proctor v. Bishop of Bath and Wells*, 2 H. Bl. 358).

Gift to an
unborn per-
son, on an
event which
may or may
not happen
within due
limits.

Where the act, the performance of which is made a condition precedent to the vesting, is of such a nature that it may be performed either before or after the devisee's majority, as entering at a university, taking a commission in the army, or the like, the fate of the gift seems to be more questionable; but, even in this case, it appears by the better opinion to be void, for the doctrine to be gathered from the authorities is, that the gift must necessarily take effect within the period allowed by the rule of law, or fail (see *Tollemache v. Earl of Coventry*, 8 Bli., N. S. 547, 2 C. & F.

made shall participate in the unappointed fund, without bringing the appointed interest into distribution; And if there shall

611). Indeed, even in the case before suggested, of a gift to a person taking orders, there is only a possibility of remoteness, because an unborn son of A. might attain the age of twenty-three or twenty-four, and be ordained in the lifetime of his father, and then the gift would in event be confined within the compass of a life in being.

Perpetuity rule.

Where a power of appointment is created by deed or will in favour of a defined class of objects, the appointment must be made to persons competent to have taken immediately under the instrument creating the power. The donee of a particular power, in exercising his power, can only limit the property in the same manner as the donor could have done, for the rule against perpetuities begins to run from the date of the instrument creating, and not of the instrument executing, the particular power. The power, however, is not void, because it includes objects exceeding the perpetuity limits (*Griffith v. Pownall*, 13 Sim. 393; *Thomas v. Thomas*, 14 Sim. 234), and if it be exercised in favour of persons within the limits, the appointment is a good one (*Hockley v. Marbey*, 1 Ves. j. 150; *Wilkinson v. Duncan*, 30 Be. 111; and see *Jesson v. Wright*, 2 Bli. 1; Sugd. Pow. 397). But a general power does not interfere with the freedom of alienation, and has no tendency to a perpetuity: consequently the rule against perpetuities begins to run from the date of the instrument executing the power (*Lewis*, Perpet. 483).

Application to powers of selection and distribution.

Particular power.

General power.

Powers to appoint to the issue of a marriage are frequently vested by an antenuptial settlement in both or one of the marrying parties; which powers, on the principle in question, must be exercised in favour of issue born in the lifetime of the parents, or one of them, which, indeed, the children of the marriage necessarily are, so that an express restriction is never required, unless the power embraces remoter issue (*Robinson v. Hardcastle*, 2 T. R. 241; *Bristowe v. Ward*, 2 Ves. j. 336; *Crompe v. Barrow*, 4 Ves. 681). As before observed, even where a power is not in terms duly restricted, yet, if it be exercised in favour of individuals who are within the line, the appointment is valid. In the converse case, *i. e.* where the power is duly restricted, but the appointment is not, the latter is a mere nullity *quoad* the remote appointees; and therefore, even if it were made to the whole as a class, yet, as the remote appointees are not objects of the power, the extension of the appointment to them would not prevent its taking effect as to the competent objects. If, however, the power is unrestricted, and the appointment is to a class embracing objects who are too remote, it will be void *in toto*, according to the rule applicable to gifts in general (*Routledge v. Dorril*, 2 Ves. j. 357).

It is also to be observed, that where an appointment is in the first instance made in favour of certain objects (who are within the scope of the power), and there is engrafted on this a clause settling the shares of one or more of the appointees in a manner not authorized by the power, the effect is not to

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—if no child,

not be any object of the preceding trust who shall acquire an absolutely vested interest, Then IN TRUST for such persons or

Rule against perpetuities.

invalidate the appointment in regard to such share or shares, but solely to detach from it the clause in question, leaving the appointment to take effect as a simple absolute disposition, according to the mode in which it originally stood (*Carver v. Bowles*, 2 R. & M. 304; *Kampf v. Jones*, 2 Ke. 756; *Ring v. Hardwick*, 2 Be. 352. See also *Church v. Kemble*, 5 Sim. 525; *Fry v. Capper*, Kay, 163; *Rucker v. Scholefield*, 1 H. & M. 36). But the clause in a case where the appointee has executed or assented to the deed of appointment, may be valid as a settlement by the appointee.

Life-interest may be given to an unborn person.

The rule against perpetuities does not prevent the giving of a life interest to an unborn person; for as persons not *in esse* at the death of the testator may be made devisees of the inheritance of lands, or legatees of the absolute interest in personalty, they are of course equally competent to take life or other partial interests. If, therefore, a testator stops at the creation of such life-interests, his disposition is perfectly consistent with the rule of law; but if he goes on to give the remainder or ulterior interest to the issue of such unborn devisees or legatees for life, this part of his scheme is annulled by the rule under consideration, which, however, leaves untouched the prior life-interest (see Sugd. Pow. 393). Thus, if a testator gives lands to A. for life, with remainder to his children for life, remainder to the children of such children as tenants in common in fee, the devise to A. and his children will take effect, and the inheritance, which the ulterior devise purports to dispose of, will descend to the heir-at-law or residuary devisee of the testator. This doctrine is not only consistent with acknowledged principles of law, but is supported by direct authority (*Cotton v. Heath*, 1 Roll. Ab. 612, pl. 3; *Routledge v. Dorril*, 2 Ves. j. 366). And in numerous other cases of a more recent date, the validity of a devise to an unborn person for life, though not forming the direct subject of consideration, was assumed in the discussion of some other question, without even an attempt being made to impeach the validity of the gift; a circumstance which strongly shows how general has been the acquiescence in the doctrine (*Doe v. Gunnis*, 4 Tau. 313; *Doe v. Vaughan*, 1 D. & Ry. 52, 5 B. & Al. 464; *Ashley v. Ashley*, 6 Sim. 358; *Denn v. Page*, 3 T. R. 87, n., 11 Ea. 603, n.; *Hay v. Earl of Coventry*, 3 T. R. 83; *Foster v. Earl of Romney*, 11 Ea. 594; *Bennett v. Lowe*, 5 Moo. & P. 485; *Williams v. Teale*, 6 Ha. 250).

A bequest to unborn issue as tenants for life, and to the executors, administrators and assigns of the survivor, is not too remote, but gives an absolute interest to the survivor (*Avern v. Lloyd*, L. R., 5 Eq. 383). And a gift over after a life interest to an unborn person is valid, if such gift over be in favour of a person who is within the perpetuity line, or of a class necessarily ascertained within the limits of the rule (*Stuart v. Cockerell*, V.-C. *Malins*, 5 Mar. 1869).

Cy près doctrine.

In some instances devises of land which extend the limitations to too remote a line of issue are rendered valid by the doctrine of *cy près*, or ap-

purposes, and in such manner, as my same daughter, being dis-
covert, shall, by deed to be executed in the presence of and

for such persons as

proximation. According to this doctrine, if a testator devises lands to A. for life, with remainder to the eldest son (unborn) of A. for life, with remainder to the first and other sons of such eldest son successively in tail, the Courts, in order to prevent the testator's intention in favour of the issue of the son of A. from being entirely defeated, accelerate the ultimate limitation, by giving the estate tail to the son himself, instead of to his son; thereby reducing the limitations to a devise to A. for life, with remainder to his first and other sons in tail. It will be observed, that, under these modified limitations, the intended tenants in tail take by descent (supposing the estate tail to remain unbarred) similar estates to those which it was attempted to vest in them by purchase (*Nicholl v. Nicholl*, 2 W. Bl. 1159; *Robinson v. Hardcastle*, 2 T. R. 241, 380, 781. See also *Hopkins v. Hopkins*, Ca. t. Talb. 44). It is clear that this doctrine does not extend to bequests of personalty (*Routledge v. Dorril*, 2 Ves. j. 357, 365); nor to gifts of real estate which would confer on the too remote issue estates in fee simple (*Bristow v. Warde*, 2 Ves. j. 336). It seems, however, to apply, where they are made tenants in common in tail (*Pitt v. Jackson*, 2 Br. C. 51; *Vanderplank v. King*, 3 Ha. 1; see also 6 Ha. 251). The doctrine, however, does not apply, where the devise to the issue of the unborn person, instead of running through the whole line of sons, is restricted to the eldest son, as in such case the devolution of the estate, under an entail (which would include all the sons), differs so widely from the destination contemplated by the testator (*Monypenny v. Dering*, 16 M. & W. 418, 7 Ha. 568, 2 D. M. & G. 145).

Rule against perpetuities.
Cy près.

The doctrine of the case of *Cadell v. Palmer* (*ante*, p. 297) does not lead to any alteration in the ordinary form of gifts to unborn children, which are commonly made to confer vested interests at majority; but it affords the means of carrying into effect the designs of some testators, who are anxious to postpone the vesting to a later age. For instance, suppose a testator, distrustful of the prudence which ordinarily belongs to the legal age of discretion, is desirous to postpone the vesting of the shares of his grandchildren, born and unborn, until the age of twenty-five; a gift aiming directly and absolutely at this object would be void (*Leake v. Robinson*, 2 Mer. 363; *Bull v. Pritchard*, 1 Rus. 213); but the gift would be rendered valid by carving out a period composed of existing lives and twenty-one years, and restraining the vesting (as in the text) within the compass of such period. This expedient, while it preserves inviolate the rule of law, exposes the testator's scheme of postponing the vesting of the grandchildren's shares until their ages of twenty-five to very little actual risk of being frustrated, since several lives and twenty-one years are almost certain to outrun one of those lives (for the parent of the objects of the gift would of course be made one of the *cestuis que vie*) and twenty-five years.

Scheme by which the vesting of shares of unborn children may be postponed beyond majority.

Prec. XIX.

daughter
shall appoint.

attested by one or more witness or witnesses, or by her will, or being covert shall, by her will, appoint; And, in default of ap-

As to the
validity of
indefinite
powers of
sale.

One point of much interest in connection with the doctrine of the rule against perpetuities is as to the validity of indefinite powers of sale, *i.e.* powers which are so framed as not necessarily to be exerciseable within the compass of a life in being and twenty-one years afterwards, and which, therefore, might seem to admit of the possibility of the estate being shifted in derogation of the limitations in the will or settlement for an unlimited period. The validity of such powers comes under consideration in the ordinary case of lands being limited by deed or will to a person for life, with remainder to his first and other sons in tail male, with remainders over. A power is reserved to A. and B., and the survivor of them, and the heirs of such survivor, with the consent of the tenant for life during his life, and after his decease in their or his own discretion, to sell the estate and revoke the uses in favour of a purchaser. As this power would appear from the absence of restriction to extend through all time, it might seem obnoxious to the rule against perpetuities: but the eldest son, as tenant in tail in remainder, being competent, with the concurrence of the tenant for life, to bar the entail and remainders, and thereby extinguish the power, the objection is at an end (*Biddle v. Perkins*, 4 Sim. 135; *Powis v. Capron*, Id. 138, n.; *Waring v. Coventry*, 1 M. & K. 249; *Boyce v. Hanning*, 2 Cr. & J. 334; *Wood v. White*, 4 M. & C. 460; *Nelson v. Callow*, 15 Sim. 353).

In none of these instances, however, has the ground of decision been very distinctly intimated; but, as it had always happened that the power had been exercised during the life estate, an opinion obtained in the Profession, that powers of this nature were valid when exercised during the lifetime of the tenant for life, but invalid if not so exercised; such we may collect to have been the view of Lord *Cottenham* from his remarks in *Wood v. White* (4 M. & C. 483). In *Lantsbery v. Collier* (2 K. & J. 709), Sir *W. Page Wood*, V.-C., reviewed the authorities respecting powers of sale not restricted in terms as to time, and declared that the Court looks to the whole intent and purpose of the settlement, and, whether the reversion or remainder in fee-simple be limited after estates for life or estates tail, will hold the power to be valid and subsisting until the estates tail (if any) are barred, or the fee-simple vested in possession—in either of which events, the purpose of the settlement is at an end, and the power is determined (2 K. & J. 722). See also *Wolley v. Jenkins* (23 Be. 53, on appeal, 5 W. R. 281); *Tuite v. Swinstead* (26 Be. 525); *Chapman v. Harris* (2 N. R. 56); Sugd. Pow. 851; 1 Jarm. Wills, 272.

The Courts, however, seem to be disinclined to extend the principle of these cases, by holding a trust, which is to extend over an indefinite range of minorities, to be valid *quoad* an existing person (*Ferrand v. Wilson*, 4 Ha. 344; *Browne v. Stoughton*, 14 Sim. 369; *Turvin v. Newcome*, 3 K. & J. 16; but see *Briggs v. Lord Oxford*, 1 D. M. & G. 363).

Prec. XIX.

pointment, IN TRUST for the person or persons who at the decease of my same daughter shall be of her blood and of kin to her and who, under the statutes for the distribution of intestates' effects, would be entitled to her personal estate if she were dead intestate and a spinster, such persons, if more than one, to take in the proportions prescribed by the said statutes, [*or, upon such trusts as would, by virtue of my will, affect the same share or shares if my same daughter were dead without having acquired an absolutely vested interest therein under the trusts aforesaid*]. AND I EMPOWER my same daughter, by her will, to appoint all or any part of the income of the same share or shares to be paid to any husband who shall survive her for his life. I DECLARE that my trustees shall have power to apply the whole or any part of the annual income to which each or any object, being a minor, of the respective trusts and provisions hereinbefore contained concerning my trust fund, shall be entitled in possession, in or towards the maintenance or education, or otherwise for the benefit of such object during minority, whether such object, being a female, shall be married or not; and the unapplied income shall be accumulated, and the accumulations thereof shall be liable to be applied in like manner, and, subject to such liability, shall be deemed accretions to the capital whence the same income arose; also power to apply any part not exceeding one moiety [*or, one third part*] of the capital to which each or

—in default of appointment, for her next of kin,

[*or, upon the trusts affecting the residue of the fund*].

Power for daughter to appoint by will life interest to husband.

Provisions for maintenance and advancement of infant objects.

It has been argued that the rule against perpetuities does not apply if the limitation be by way of remainder. See 3rd Rep. R. P. Commissioners, p. 29; J. Williams, R. P. 261; and *Cole v. Sewell* (4 Dr. & War. 1; affirmed, 2 H. L. C. 186). "It is now perfectly settled that where a limitation is to take effect as a remainder, remoteness is out of the question; for the given limitation is either a vested remainder—and then it matters not whether it ever vest in possession, because the previous estate may subsist for centuries or for all time—or it is a contingent remainder, and then, by the rule of law, unless the event upon which the contingency depends happen so that the remainder may vest *eo instanti* the preceding limitation determines, it can never take effect at all" (*per* Lord St. Leonards, 4 Dr. & War. 28). But see Lewis, Perpet. 408, Supp. p. 97; *Monypenny v. Dering*, 16 M. & W. 428, 2 D. M. & G. 145; *Challis v. Doe*, 18 Q. B. 231 (reversed, nom. *Evers v. Challis*, 7 H. L. C. 531, 7 W. R. 622).

Whether the objection of remoteness is applicable to a remainder.

See further, on the subjects of this note, the case of *Cadell v. Palmer*, and the notes thereto, in Tud. L. C. R. P. 360—429; Lewis on Perpetuity; 1 Jarm. Wills, 226, *et seq.*

Prec. XIX.

Annuity to wife marrying again, to be secured by setting apart three per cent. stock.

Provision for wife to be in bar of dower.

Devise of

Remarks on the clause excluding dower.

Dower Act, 3 & 4 Will. 4, c. 105.

any object [*or, male object*] of the same respective trusts and provisions shall be entitled in possession or reversion, in or towards the establishment or advancement in the world of such object; but so that if the object be entitled in reversion, such application shall not be made without the consent in writing of the previous taker, who, if a daughter of mine, shall be competent, notwithstanding coverture, to consent. I DIRECT my trustees, if my said wife shall marry again, to pay a clear annuity of £ — into her proper hands during her life, by equal half-yearly payments, to be enjoyed by her free from the control and engagements of her then present or any future husband, and without power of anticipation, as a separate and inalienable provision, for which her receipts alone shall be sufficient discharges to my trustees; the first payment to be made at the end of six calendar months next after her marriage; And I further direct my trustees to set apart, in their names, out of my trust fund, stock in Bank Three per Cent. Annuities (but not in any other investment), sufficient, at the period of appropriation, to answer the same annuity, which stock shall, subject to the payment of such annuity, be held upon the trusts affecting the residue of the said trust fund. I DECLARE that the provision hereby made for my said wife shall be accepted by her in full satisfaction of her claim to dower and freebench out of any real estate of which I have been, or now am, or shall be seised, possessed or entitled (i). I GIVE all the

(i) If the testator were married on or before the 1st of January, 1834, the present clause would have the effect of obliging his widow to elect, either to relinquish her dower, or to renounce the benefit derived under the will; and would be useful as preventing the occurrence of the much-agitated question, whether the devise to the wife was to be considered as including the dower, so as to subject the widow to the necessity of electing (1st Rep. of R. P. Commissioners; and see *Parker v. Soverby*, 4 D. M. & G. 321, and the cases there cited). If the testator's marriage were subsequent to the 1st of January, 1834, the dower of his widow is subject to the regulations of the Act of 3 & 4 Will. 4, c. 105; which (sect. 9) makes a provision for the wife, out of real estate of which she would be dowable, operate *ipso facto* to exclude her claim to dower out of such estate. On the other hand, a provision out of personalty, or out of any other real property not liable to dower (sect. 10), will not bar the widow of her dower, unless accompanied by an express declaration. The testator may, however, by deed (sect. 6), or by will (sect. 7), and without giving his widow any substituted benefit, expressly annul her claim; so that dower has become by the effect

legal interests which shall at my decease be vested in me as trustee or mortgagee, in any real or personal estate, UNTO AND

trust and mortgage estates.

of the enactment an interest disposable by the husband, and, like the widow's distributive share in his personal estate, devolves to her only in the event of the husband's disposing power not being exercised. The Act has (sect. 2) abolished the much-reprobated distinction in regard to dower, between legal and equitable interests, by extending the right of dower to the latter. It must be remembered that none of these modifications apply to persons whose marriage took place anterior to the 2nd of January, 1834. See the Act more fully treated of, 1 Hayes, Conv. 300; see also Hawkins, Constr. Wills, 272. It is observable, that, where the widow, whose right to dower is governed by the old law, takes an absolute estate for life in the testator's real estate, the point respecting her right to take both the testamentary provision and the dower is of little importance, except in relation to real estate acquired by the testator after the making of his will.

Dower Act.

The Dower Act does not apply to copyholds (*Pondrell v. Jones*, 2 S. & G. 415; *Smith v. Adams*, 5 D. M. & G. 718); but does apply to gavelkind lands (*Farley v. Bonham*, 2 J. & H. 177).

By the common law, an alien woman married to an Englishman is not entitled to dower (*Count de Wall's case*, 6 Moo. P. C. 216, 12 Jur. 145). But by 7 & 8 Vict. c. 66, s. 16, the wife of a natural-born subject or person naturalized has all the rights of a natural-born subject.

Where a woman has before marriage agreed to accept a consideration for her widow's share under the Statute of Distributions, she is, of course, bound by that agreement, and cannot claim any share of her deceased husband's personalty (*Gurly v. Gurly*, 8 C. & F. 743; *Thompson v. Watts*, 2 J. & H. 291); but where a rent-charge was, on marriage, settled on the wife for her jointure and in lieu of dower and thirds at common law, the rent-charge was regarded as intended to be in lieu of the wife's claim on her husband's lands only, and was held not to bar the widow of her distributive share of her husband's undisposed of personalty (*Colleton v. Garth*, 6 Sim. 19); as to the effect of a separation-deed executed by the wife, see *Slatter v. Slatter* (1 Y. & C. Ex. 28). But where a husband by will makes a provision for his wife, expressed to be in lieu of her claim on his personalty, the widow is, notwithstanding, entitled to her share of any personalty which, in the event, may be undisposed of (*Pickering v. Lord Stamford*, 3 Ves. 332; and see 2 Wms. Exors. 1379). See also *Wetherell v. Wetherell* (1 D. J. & S. 134).

Provision in lieu of dower or thirds.

In *Gurly v. Gurly* (8 C. & F. 743), in a provision in lieu of dower or thirds claimable "at common law," the words "at common law" were held to be equivalent to "according to the general law." In *Nottley v. Palmer* (2 Drew. 93), a provision by will in lieu of "all dower and thirds at the common law or otherwise" was held to operate in bar of freebench. In *Willis v. Willis* (34 Be. 340), a settlement of copyholds "in order to make some provision for" the intended wife, was held not to debar her of her

Prec. XIX.

Receipts of trustees to be discharges.

Power to wife during widowhood, and after her death or marriage to trustees or trustee for the time being, to appoint trustees.

Appointment of executors and guardians.

Payments to executors under probate afterwards revoked;

TO THE USE of my said trustees [*names*], upon such trusts and subject to such equities as shall be subsisting therein respectively. I DECLARE that the receipts of my trustees shall exonerate purchasers and others paying moneys to such trustees by virtue of my will, from all liability in respect of the application thereof, and from the necessity of inquiring as to the propriety or regularity of any sale, or other transaction purporting to be made under the trusts or provisions of this my will. I DECLARE that if my trustees hereinbefore named, or any of them, shall die in my lifetime, or if they, or any of them, or any trustee or trustees to be appointed under this provision, or by a Court of competent jurisdiction or otherwise according to law shall, after my death die, or become unwilling, unable or unfit to act as trustees or trustee of my will, or desire to retire from that office, it shall be lawful for my said wife, during her widowhood, and, after her death or marriage, for the trustees or trustee for the time being, whether continuing or declining to act, or, if none, for the acting executors or executor for the time being, or the administrators or administrator for the time being, of the trustee who shall then last have died in the office, to appoint any fit person or persons to be a trustee or trustees in the place of any trustee or trustees dying or becoming unwilling, unable or unfit to act, or desiring to retire from the office. I DECLARE that the expression "my trustees" shall throughout my will be construed as comprising and including the trustees or trustee for the time being of my will. I APPOINT my said wife, she continuing my widow, and the said [*trustees*], to be executors of this my will (*k*); and my said

freebench in other copyholds as to which the husband died intestate. As to the forfeiture under the Stat. of Westminster 2 (13 Edw. 1), c. 34, of a woman's dower, by reason of her adultery, see *Woodward v. Dowse* (10 C. B., N. S. 722); *Bostock v. Smith* (34 Be. 57); and as to the right of a wife, divorced *à mensâ et thoro* for adultery, to a distributive share of personalty, see *Rolfe v. Perry* (1 N. R. 428, 11 W. R. 357).

(*k*) By the Probate Act (20 & 21 Vict. c. 77), where any probate is revoked, "all payments *bonâ fide* made to any executor under such probate, before the revocation thereof, shall be a legal discharge" (sect. 77), and all persons making any payment *bonâ fide* upon any probate are indemnified and protected in so doing (sect. 78). Prior to the Probate Act, a *bonâ fide* payment made to an executor, under a void probate, but before revocation thereof, was a legal discharge to the debtor, if the grant of

wife, she continuing my widow, and, after her death or marriage, the said [*trustees*], and, after the death of the survivor of the said trustees, my said brother [*name*], to be guardian or guardians of my infant children. I REVOKE all prior testamentary dispositions. IN WITNESS, &c.

probate was by a Court of competent jurisdiction (*Allen v. Dundas*, 3 T. R. 125; but see *Ex parte Jolliffe*, 8 Be. 168; and as to *bonâ fide* payment to a married executrix, to whom, from non-assent of husband, probate was subsequently refused, see *Pemberton v. Chapman*, 5 Jur., N. S. 567): but this is to be understood only where the grant was revoked on citation; if it was reversed on appeal, the executor's authority was suspended by the appeal, and subsequent payments were void (see *Wms. Exors.* 558). It would seem also that a *bonâ fide* payment to an administrator is good, even though there be a will existing (*Prosser v. Wagner*, 1 C. B., N. S. 289. See also *Bevan v. Lloyd*, 10 Ir. Law Rep. 228; *Macquire v. Denham*, Ib. 240).

—or to administrator when a will exists.

By sect. 91 of the Probate Act, it is enacted, that a depository shall be provided, under the control and directions of the Court of Probate, for the safe custody of the wills of living persons; and all persons may deposit their wills in such depository upon payment of such fees, and under such regulations, as the judge shall from time to time by any order direct.

Depository for custody of wills during the life of testators.

A depository has now been provided at No. 6, Great Knight Rider Street, Doctors' Commons. Wills, enclosed in sealed envelopes, are received by the registrars at the principal or any district registry, and forwarded to the depository, upon payment of the fees and upon the conditions set forth in the Appendix. See the remarks of Sir *J. Wilde*, J.-O., in *Johnson v. Lyford* (L. R., 1 Prob. 546), as to the desirability of a depository for wills.

No. XX.

WILL of a TRADESMAN, disposing of Real and Personal Estate in favour of his Wife and Children.—Property vested in Trustees, with Directions to sell, let and manage the Real Estate, and to carry on Trade.—Wife, during Widowhood, to have the Use and Occupation of Testator's House and Furniture, and to receive the Income of the Trust Estate, maintaining and bringing up the Children.—Portions to be raised for Children requiring Advancement during her Widowhood.—On her Death or Marriage, the Capital to be distributed among the Children.—Directions for Maintenance and Advancement; for Investment of Trust Funds.—Powers to settle Testator's Affairs; to employ Accountants, &c.; to appoint Trustees, &c.—Appointment of Executors and Guardians.

Devise of
real and per-
sonal estate
to trustees.

THIS IS THE LAST WILL AND TESTAMENT of me, [*testator's name and description.*] I DEVISE AND BEQUEATH all the real and personal estate which shall belong to me at my decease unto and to the use of [*trustees*], As to the real and personal estate not belonging to me beneficially, UPON TRUST to dispose thereof according to the equities affecting the same; AND as to the real and personal estate belonging to me beneficially, and which is hereinafter comprised under the denomination of "my trust property," UPON TRUST to dispose thereof according to the directions hereinafter contained; (that is to say), I DIRECT that my trustees shall, at such time or times after my wife [*name*] shall die or marry again, as, having regard to the destination of my trust property under this my will, they shall judge expedient, or during her widowhood with her written consent, sell my real trust property by public or private sale, together or in lots, with power to make any special or other conditions of sale as to the title or the evidence of title or otherwise, and to buy in the premises at any sale by public auction, and to rescind,

Trustees to
sell real
estate after
wife's death
or marriage,
or sooner
with her con-
sent, and in
the mean-
time to let
and manage.

either on terms or gratuitously, any contract, and to resell, without being answerable for any loss, and invest the produce conformably to the clause for the investment of moneys herein-after contained; and shall in the meantime let, from year to year, or for a term of years, upon husbandry, building, repairing or improving leases, or occupy and use, my said real estate, and manage the affairs thereof generally at their discretion, but subject to the directions hereinafter contained in favour of my said wife. I DIRECT that my debts and funeral and testamentary expenses shall be paid, as soon as may be, out of such parts of my personal estate as shall not be required to answer the direction next hereinafter contained; but this direction, or the power to pay debts hereinafter given to my executors, shall not revive or improve the condition of any debt barred, or in the progress of being barred, by any statutory or other limitation. I DIRECT that my trustees shall permit my said wife, she continuing my widow, to carry on the trade or business (a) in

Trustees to pay debts, &c. (not statute run), out of personality not employed in trade.

Trustees to permit wife to carry on

(a) An executor or administrator is not justified in continuing the testator's or intestate's trade, without an express authority; and where a testator empowered his executors to carry on his business, but they renounced, it was held that the administrator could not carry it on under the power (*Lambert v. Rendle*, 3 N. R. 247). The executor or administrator renders himself liable for any loss which may be consequent on his continuing the trade (*Ex parte Watson*, 2 V. & B. 414; see also *Barker v. Parker*, 1 T. R. 295); whilst, on the other hand, if the unauthorized trading is prosperous, the gain belongs wholly to the persons beneficially interested in the capital embarked in it (*Luntley v. Royden*, Ca. t. Fin. 381; *Burden v. Burden*, cit. 1 J. & W. 134; *Macdonald v. Richardson*, 1 Gif. 81); and the Court of Chancery will, at the instance of such persons, direct an inquiry whether it will be most advantageous to the cestuis que trust, being infants, to take interest (the rate of which in such cases is always five per cent.) or profits (see *Heathcote v. Hulme*, 1 J. & W. 134), the ascertainment of which, however, is often attended with great difficulty (*Wedderburn v. Wedderburn*, 4 M. & C. 41). But if the concern is prosperous during part of the time for which it is carried on, and unprosperous for the remainder, it seems that the parties beneficially interested would not, unless under special circumstances, be allowed to take profits during the former and interest during the latter period; but must elect between the interest and profits for the whole period (*Heathcote v. Hulme*, 1 J. & W. 128). As to the accounts which will be directed in respect of mines worked by the executor (he being also ultimate residuary legatee), until they become unremunerative, see *Wightwick v. Lord* (6 H.

As to executor carrying on trade.

Prec. XX.

trade and
employ real
and personal

which I shall be engaged at my death, and to use and employ for that purpose such part of my real and personal estate as

Executor
carrying on
trade.

L. C. 217). An executor or administrator who is desirous, without authority, to continue the testator's or intestate's trade, on behalf of infants, (or others who are incapable of determining for themselves), should file a bill in equity, praying for an inquiry whether it will be for the benefit of the infants that the trade should be continued. (See 1 J. & W. 130). Nevertheless, an executor is justified in keeping a trading establishment on foot, merely for the purpose of completing orders given in the testator's lifetime, or of disposing of the stock and goodwill to advantage (*Garrett v. Noble*, 6 Sim. 504; *Marshall v. Broadhurst*, 1 Cr. & J. 405; *Dakin v. Cope*, 2 Rus. 170).

Personal re-
sponsibility
of a trading
executor.

A testator's direction to his executor to carry on his trade has, of course, no further effect than that of justifying the measure, as between claimants under the will; it does not prevent a trading executor from incurring responsibility to third persons (*Lucas v. Williams*, 3 Gif. 150). He is liable to be sued by the creditors of the concern, who may take the executor's own property in execution (*Wightman v. Townroe*, 1 M. & S. 412); and he becomes amenable to the bankrupt laws (*Ex parte Nutt*, 1 Atk. 102); but no such consequences ensue from the mere disposal of the testator's stock; and it has been held that the executor of a wine-cooper was not constituted a trader by his having purchased wines in order to refine the testator's stock (*Ib.*).

From what has been stated of the situation of an executor carrying on the testator's trade, it is obviously not to be assumed as a matter of course, that every person who might be willing to undertake the ordinary duties of the office would be disposed to subject himself to the risks inseparable from carrying on a trade; and wills, therefore, containing a direction for the carrying on of the testator's trade ought to provide against the event of the executor declining to do so, and should also authorize him, if he should commence the undertaking, to relinquish it at any time; since a person may otherwise be induced to renounce the executorship altogether, as the only means of escaping from the hazards which the testator has annexed to the office.

As to the
quantum of
capital which
may be em-
ployed.

Though the entire property of the executor himself is liable to the engagements of the trade, yet that of the testator, it seems, is liable only so far as he has subjected it. If the will authorizes the employment of his whole property in the trade, the whole thereby becomes subject to its engagements. But if the testator has limited the capital of the trade to a certain amount, or to property of a particular description, then this appropriated part will be liable in exclusion of the general assets; and if an executor, without any authority from the will of the testator, takes upon himself to trade with the assets, the testator's estate will not be liable, in the event of the executor's bankruptcy (*Cutbush v. Cutbush*, 1 Be. 184; *Ex parte Garland*, 10 Ves. 110; *Ex parte Richardson*, 3 Mad. 138;

Prec. XX.

estate: if
she die,
marry,

shall be then used or employed therein, with power for my trustees to increase or diminish, at their discretion, the real and

Thompson v. Andrews, 1 M. & K. 116; *Labouchere v. Tupper*, 11 Moo. P. C. 198; 5 W. R. 797). And if the executor employs a larger sum than his testator has authorized, the excess, in the event of the executor becoming bankrupt, may be proved as a debt under the bankruptcy (*Ex parte Garland*, 10 Ves. 110; *Re Butterfield*, De G. 319, 11 Jur. 955). Where a testator directed generally that his executors should be his successors, for the benefit of his estate, in a business carried on by him in partnership, Sir *J. Leach*, V.-C., was of opinion that an executrix carrying on the business was not justified in employing more of the assets than the actual capital (*Ex parte Richardson*, 3 Mad. 157). It seems that in general the creditors of the trade, as such, have no claim against assets in the hands of legatees, among whom distribution has been made under the direction of the same will which has authorized the trade to be carried on (Id. 138). If any pecuniary remuneration is intended to be made to executors for their trouble in carrying on the trade, the testator should expressly authorize it; since otherwise this, like all the other duties of the office, must be performed gratuitously (*Burden v. Burden*, 1 V. & B. 170): though, if an executor employ a third person to conduct the trade, he will be allowed the salary paid to such person. It seems, too, that the Court will, upon a proper application, make a prospective allowance to an executor for any extra trouble of this nature.

Executor
carrying on
trade.

As between the creditors of a testator, who was in his lifetime one of several members of a partnership concern, and the estate of that testator, the case of *Labouchere v. Tupper* (11 Moo. P. C. 198; 5 W. R. 797) has decided, (1) that an executor carrying on his testator's trade, though avowedly as executor, is personally liable for all the debts contracted after the testator's death, quite irrespectively of the executor's right of indemnity from the testator's estate; and (2) that in such a case the creditors have no rights, as creditors of the testator, against his estate in respect of debts contracted after his death; and (3) that the executor of a deceased shareholder in a joint-stock banking company is not liable to make good out of his testator's assets debts contracted by the company after the testator's death; though the shares were registered in the executor's name, and he received the dividends as executor; the debts due at the testator's death having been discharged by the company. But Sir *J. L. Knight Bruce*, in delivering the judgment of the Judicial Committee, said "It may possibly be, but we do not assert it, that the assets of the testator are liable to the company, or to the executor, or to both, in respect of the testator's shares, by reason of the banking partnership deed and the transactions and course of dealing subsequent to the testator's death; but any such considerations seem to their lordships not for any present purpose material."

*Labouchere
v. Tupper.*

Prec. XX.

— or decline,
trustees may
carry it on.

Trustees to
permit wife
to occupy
house and
use furni-
ture, &c.

Trustees to
convert per-
sonal estate
not invested
in stock, &c.,
and to call in
or continue
such invest-
ments;

—to permit
wife during
widowhood
to receive
the whole
income of
real and per-
sonal estate.

Wife to
maintain, &c.
infant sons
and unmar-
ried daugh-
ters.

Executor
carrying on
trade.

personal estate so used or employed; and in the event of her dying, marrying, or declining to carry on such trade or business, then my trustees, if they shall think fit, may in like manner carry on the same for such period as, having regard to the directions hereinafter contained concerning my trust property, they shall judge expedient. I DIRECT that my trustees shall permit my wife, she continuing my widow, personally to occupy as her residence the messuage wherein I now reside at — aforesaid, with the appurtenances; and to use therein my household furniture and utensils, plate, linen, china and consumable stores, she keeping the said messuage in repair and paying the expense of insuring the same from loss or damage by fire, and also the taxes and other outgoings affecting the same. I DIRECT (but subject to the previous dispositions) that my trustees shall sell and convert my personal trust property, not consisting of moneys invested in stocks, funds or securities yielding income (other than personal securities); and shall, at their discretion, either get in the moneys invested, as last aforesaid, or permit the same to continue so invested, and shall invest the produce of the trust property so converted or gotten in, pursuant to the general direction for investment hereinafter contained. I DIRECT that my trustees shall permit my wife, she continuing my widow, to receive from my death the net annual income actually produced by my trust property, howsoever constituted or invested, and whether yielding more or less than the ordinary rate of interest, including a proportion of the payments accruing due at my death, whether ordinarily apportionable or not, and including the profits of my trade or business, if carried on pursuant to the direction hereinbefore contained. I DIRECT that my wife, during her widowhood, shall, out of the income to be received by her pursuant to the last clause, maintain, educate and bring up my children, being sons, until the age of twenty-

As to the right of cestuis que trust to a proportion of profits, where trustees (who were authorized to continue a testator's trade with his surviving partner under a partnership for a term of years) on the determination of the partnership permitted part of the capital to remain in the business on certain conditions, see *Stroud v. Gwyer* (28 Be. 130).

See also on the subject of this note, 2 Wms. Exors. 1654; and 7 Jarm. Byth. 176, n. (c).

one years, and, being daughters, until that age or marriage (b); and shall also maintain such of my daughters as, being of that age, shall not be or have been married; but my trustees shall not be obliged to see this direction fulfilled; And that if any of my children, being sons, shall attain twenty-one, or, being daughters, shall be married during the widowhood of my wife, then it shall be lawful for my trustees, but subject to the specific dispositions hereinbefore contained, to raise by such means as they shall judge expedient, out of my trust property, for each such child, any sum not exceeding £ —, to be applied towards his or her advancement in life, in such manner as my trustees shall think most beneficial, and to be accounted for by such child on the distribution of my trust property, pursuant to the direction hereinafter contained. I DIRECT that, subject to the preceding directions, my trustees shall hold my trust property for the absolute use of my child, if only one, or all my children equally, if more than one, who, either before or after my death, being a son or sons, shall attain the age of twenty-one years, or, being a daughter or daughters, shall attain that age or be married (c). I DIRECT that my real estate shall be considered, for the purposes of enjoyment and transmission under the trust declared by the last clause, as converted into personal estate from my death. I DIRECT that my trustees, after the death or marriage of my wife, shall apply the whole, or so much as they shall

Trustees to advance sons coming of age and daughters marrying during wife's widowhood.

Real and personal property (subject to preceding directions) to be in trust for sons attaining twenty-one, and daughters attaining twenty-one or marrying, equally. Unsold real estate impressed with the quality of personality.

(b) As to a claim on the income after the attainment of majority, see *Badham v. Mee* (1 R. & M. 631); *Carr v. Living* (33 Be. 474); and *Leigh v. Leigh* (12 Jur. 907), where the gift of the income of the residue to the wife during widowhood was not cut down by force of its being a gift for the bringing up, maintenance and education of children, or by a subsequent gift to the children at twenty-one or marriage. See also *Bronne v. Paull*, 1 Sim., N. S. 92; *Jodrell v. Jodrell*, 14 Be. 397; *Re Saunderson's Trust*, 3 K. & J. 497.

(c) It is always to be remembered, that a trust framed in the usual manner in favour of males who attain majority, and females who attain majority or marry, leaves unprovided for the case of a male marrying and dying during minority, leaving issue—an event certainly not far removed from probability. Unless the testator deliberately chooses, in such a case, to subject the issue to the hardship of absolute exclusion, by way of check on the imprudence of early marriages, it would seem proper to make the shares of the entire class (including both male and female objects) vest at twenty-one or marriage.

Prec. XX.

Trustees,
after death
or marriage
of wife, to
apply income
of children's
shares for
their main-
tenance.

[Or, trustees,
after death or
marriage of
wife, to
maintain
children out
of the aggre-
gate income
of the in-
vested
shares.]

Trustees
may, after
death or mar-
riage of wife,
advance
children out
of their ex-
pectant
shares.

Trustees,
after death
or marriage
of wife, to
invest con-
tingent por-
tions.

Invest-
ments;

—power to
vary.

Power to
wind up
affairs, com-
pound debts,
&c.

think fit, of the annual income of the contingent portion to which each child of mine shall be entitled under the same trust, towards the maintenance, education or bringing up of such child, and shall accumulate the unapplied income, and add the accumulations to the portion whence the same shall have arisen.

[Or, I DIRECT that my trustees, after the death or marriage of my wife, shall apply the whole, or so much as they shall think fit, of the income of the portions of my children for the time being contingently entitled, as a common fund for their maintenance, education and bringing up, in such manner as my trustees shall judge expedient, accumulating the surplus income in aid of the said common fund, and the income and accumulations ultimately unapplied shall follow the destination of the capital whence the same shall have arisen.] I DIRECT that my trustees shall have power in their discretion, after the death or marriage of my wife, to raise, by such means as they shall judge expedient, out of my trust property, any part not exceeding one-half of the principal or value of the contingent portion of each child, and apply the same for his or her advancement in life. I DIRECT (but subject to the provision for advancement hereinbefore contained) that my trustees shall, after the death or marriage of my wife, invest and continue invested in their names, pursuant to the general direction hereinafter contained, the contingent portions of my children (*d*). I DIRECT that all investments to be made in pursuance of my will shall be made in or upon Three per Cent. stock of the United Kingdom, or Bank stock, or Exchequer bills, or upon first mortgages of freehold, copyhold or leasehold estates in England or Wales and not elsewhere, and not in or upon any other investment; And that my trustees shall have power, in their discretion, to vary such investments for any others of the description specified in this direction. I DIRECT that my trustees shall have power at their discretion, to settle my accounts and wind up my affairs, and in so doing to make such arrangements relative to debts or demands due, or claimed to be due, to or from my estate, as they shall judge expedient, with liberty to accept compositions or

(*d*) See *post*, p. 336, for a clause of substitution in case of the death of a child of testator in his lifetime leaving issue surviving the testator. See also *ante*, p. 276.

securities from and grant indulgences to debtors, and wholly to release property mortgaged or pledged, on part payment of the money secured, and to admit the claims of creditors on evidence not strictly legal, and to pay demands which have become barred by any statutory or other limitation, and also to submit questions and accounts to arbitration (*e*). I DIRECT that my trustees may Power to em-

(*e*) In *M'Culloch v. Daves* (9 D. & Ry. 43), Mr. Justice Bayley considered that executors would not be justified in paying a debt which was barred by the Statute of Limitations; his Lordship observing, that "they had no right to waive any legal defence; and if they did, and were to pay a debt against the recovery of which there was any legal bar, they would render themselves liable." But this dictum has been disapproved, and it has been held that an executor is not bound to set up the Statute of Limitations (*Stahlschmidt v. Lett*, 1 S. & G. 415; *Hill v. Walker*, 4 K. & J. 166; see also *Moodie v. Bannister*, 4 Drew. 432; *Hunter v. Baxter*, 3 Gif. 214; 2 Wms. Exors. 1664); and he may pay a debt barred by the statute, even though the personal estate of the testator be insufficient for the payment of unbarred debts, which are thereby thrown upon the real estate (*Lewis v. Rumney*, L. R., 4 Eq. 451). But after a decree for administration, an executor is bound to set up the statute (*Phillips v. Beal*, 32 Be. 26). The creditor of an intestate is entitled to administration, although his right of action is barred by the statute, but the Probate Court makes it a condition that he shall give a bond to distribute the assets rateably amongst all the creditors, without any preference of his own debt (*Coombs v. Coombs*, L. R., 1 Prob. 288). And as to the power to pay debts, compound claims, &c. of executors acting under a will executed after the 28th August, 1860, see 23 & 24 Vict. c. 145, s. 30, *ante*, p. 112. The power in the text, as it embraces some details not comprised in the statutory power, is retained.

As to payment of debts barred by the Statute of Limitations.

Before the act of 9 Geo. 4, c. 14, it was often a question whether executors had not, by putting forth public advertisements inviting the claims of creditors, revived or perpetuated debts owing by their testators, which would otherwise have been barred by the Statute of Limitations (*Andrews v. Brown*, Pre. Ch. 385; *Jones v. Scott*, 1 R. & M. 255); but that statute, by requiring engagements of this nature to be in writing, and signed by the party to be charged, has, of course, deprived advertisements of all such effect.

Effect of advertisements in reviving debts;

It was formerly much doubted whether a devise of real estate in trust for the payment of debts had the effect of reviving a debt which at the time of the testator's decease would have been barred by the Statute of Limitations; but the negative was established by the case of *Burke v. Jones* (2 V. & B. 275). However, it is clear, that, if the six years allowed by the statute, in the case of a simple contract debt, have not run out in the testator's lifetime, a devise in trust for payment of debts, or a mere

—of a devise upon trust to pay debts;

Prec. XX.

employ bailiffs,
&c.

One of the
trustees, a
solicitor, to

employ bailiffs, collectors, clerks, accountants and servants in collecting debts and rents (*f*), and otherwise in the administration of my trust property, and in making out and keeping the accounts thereof, with such salaries and allowances as they shall think reasonable. I DIRECT that my trustee [*name*], whether he shall accept the trusteeship or not, shall be the solicitor (*g*)

—of a be-
quest of per-
sonalty.

charge of debts, will prevent the time from going on so as to constitute a bar; for it is not expected that creditors should pursue their legal remedies after a trustee has been appointed to pay them (*Executors of Fergus v. Gore*, 1 Sch. & Lef. 107; *Hargreaves v. Michell*, 6 Mad. 326; *Hughes v. Wynne*, T. & R. 307; *Moore v. Petchell*, 22 Be. 172). But a bequest of personalty for the payment of debts does not prevent the operation of the statute (*Scott v. Jones*, 4 C. & F. 382; *Freaker v. Cranefeldt*, 3 M. & C. 499; *Evans v. Tweedy*, 1 Be. 55; 2 Wms. Exors. 1873; but see *Williamson v. Naylor*, 3 Y. & C. Ex. 208; *Moore v. Petchell*, 22 Be. 172).

As to the em-
ployment by
an executor
of a collector
of debts.

(*f*) Where the debtors or tenants of a testator are numerous, or widely scattered, it is not to be expected that an executor or trustee should personally employ himself in the collection of the debts or rents; but the allowance claimed for a collector's salary is sometimes resisted. In one case the Master considered a percentage of five per cent. paid by the executor of a tailor to a collector, who had received sixty-five debts, to be excessive, and allowed two and a half per cent. only; and Sir *J. Leach*, before whom the question was brought, coincided with the Master; his Honour's only doubt being, whether the diminished percentage ought to be allowed, observing, that, "generally speaking, executors are not allowed to employ an agent to perform those duties, which, by accepting the office of executors, they have taken upon themselves" (*Weiss v. Dill*, 3 M. & K. 26). And compare the next following note.

No allowance
to trustee for
his trouble.

Solicitor-
trustee.

(*g*) No rule is more firmly established than this; that a trustee, executor or administrator, shall have no allowance for his care and trouble (*Robinson v. Pett*, 3 P. W. 249; and see the notes to that case in 2 Tud. L. C. Eq. 219—244). And this rule extends to professional services, so that an attorney or solicitor can charge his *cestui que trust* only for costs out of pocket (*New v. Jones*, 1 M. & G. 668, n.; *Moore v. Frowd*, 3 M. & C. 45; *Bainbrigg v. Blair*, 8 Be. 588); neither can the partner of a solicitor-trustee charge for his services (*Collins v. Carey*, 2 Be. 128; *Christophers v. White*, 10 Be. 523; see, however, *Clack v. Carlon*, 9 W. R. 568, *sed qu.*). But the costs of a town-agent in a cause are allowed (*Burge v. Brutton*, 2 Ha. 373); and a trustee, though he be a solicitor, may employ another solicitor to transact for him professional business relating to the trust (*Stanes v. Parker*, 9 Be. 389). As a general rule, however, an executor or trustee is not allowed to employ an agent to perform those duties which, by his acceptance of the office, he has taken upon himself; (see the preceding

Prec. XX.

to my trust property, and as such, notwithstanding his acceptance of the trusteeship, be allowed all professional and other charges for his time and trouble which, if employed as solicitor to my trustees, not being himself a trustee, he would be entitled to make. I DIRECT that purchasers and others, taking the receipt of my trustees on the payment or transfer to them of any money or effects, shall be thereby exonerated from all liability in respect of the application thereof. I DIRECT that my trustees may deduct, and mutually allow to each other, all disbursements and expenses incident to the execution of my will, and shall be responsible each for his own acts and defaults only, and irresponsible for losses occurring without wilful neglect or default, and shall be indemnified with or out of my trust property against all liabilities consequential on the execution of my will, and particularly as regards the carrying on of my trade pursuant to the direction hereinbefore contained. I DIRECT that any person herein appointed or to be appointed a trustee, who shall cease to be resident in the town of —, or within — miles from the parish church [*or town-hall*] thereof (*h*), shall cease to be

be allowed to act and charge as such.

Trustees' receipts to be discharges.

Trustees allowed to deduct expenses, and indemnified against losses.

Trustees to reside within certain limits; appointment of new trustees; direction as

note): but under special circumstances he may be allowed the expenses incurred by the employment of agents. See further, as to solicitor-trustees, *York v. Brown*, 1 Col. 260; *Re Wyche*, 11 Be. 209; *Cradock v. Piper*, 1 M. & G. 664 (as to which see the remarks of Lords *Cranworth* and *Brougham* in *Manson v. Baillie*, 2 Macq. 82, 91); *Lincoln v. Windsor*, 9 Ha. 158; *Broughton v. Broughton*, 5 D. M. & G. 160; *Lyon v. Baker*, 5 De G. & S. 662; *Pollard v. Doyle*, 1 Dr. & S. 319.

So also, where a solicitor is appointed executor, and he accepts the office, he must perform all the duties thereof without remuneration: even if authorized by the will to charge for "professional services," he cannot charge for the performance of those services which ought to be rendered by an executor in a lay capacity, but is entitled to remuneration only for such services as are strictly "professional" (*Harbin v. Darby*, 28 Be. 325). It will be seen, however, that the form in the text provides that proper remuneration shall be made for services generally, and not only for such as are strictly professional.

Solicitor-executor.

(*h*) Distances are measured, not by the nearest practicable way of access, but "as the crow flies." Such at least is the method adopted in construing Acts of Parliament (*Regina v. Saffron Walden*, 9 Q. B. 76; *Lake v. Butler*, 24 L. J., Q. B. 273), and contracts (*Duignan v. Walker*, Joh. 446), where mention is made of a given distance without specifying the mode of measurement. It is presumed that the same method would be applicable to the measurement of distances mentioned in a will; and that if testator means the measurement to be taken along the roads, streets, railways, or other ways of communication, he must express his intention.

Mode of measuring distances.

Prec. XX.

to vesting
trust estate
in new trus-
tees.

a trustee ; and that any and every vacancy in the trusteeship of my will, occasioned by disclaimer, resignation, non-residence, incapacity or unfitness, or by death (whether in my lifetime or after my decease), shall be supplied as soon as may be by the appointment of a fit substitute, resident as aforesaid ; such appointment to be made by my wife during her widowhood, and, after her death or marriage, by the continuing trustees or trustee, if any, or, if none, by the acting executors or executor for the time being, or the administrators or administrator for the time being of the last deceased trustee ; and, on every such appointment, my trust property transferable at law shall be legally vested by proper conveyances, and my trust property not transferable at law shall be equitably vested by force of the appointment itself, in the new trustees, either alone, or, as the case may require, jointly with the continuing or surviving trustees or trustee (*i*). I DIRECT that the

Trustees or

As to the ad-
mission of
extrinsic
evidence.

(*i*) Generally, parol evidence is inadmissible to affect the construction of a will in writing. Oral declarations and letters of the testator are rejected. Express republication of an antecedent will is not controlled by parol evidence ; evidence to the effect that a testator, in a codicil duly executed, referred to a will of 1752, by mistake for one of 1756, was not admitted (*Lord Walpole v. Lord Cholmondeley*, 7 T. R. 138). The rule in this case was followed under the new law in *Re Chapman* (1 Rob. 1), where it was laid down, that the Court has power to receive parol evidence that a clause of a will was inserted by mistake, and, if such evidence is satisfactory, to expunge that clause (see *ante*, p. 11) : so the Court may receive parol evidence to explain a word, but not to substitute one word for another (see also *Re Davy*, 1 Sw. & Tr. 262) : but to decree probate of a prior will intended to be, but not actually, referred to by a subsequent codicil, would in effect strike out one set of words and substitute another (1 Rob. 4). In three recent cases, *Re Steele*, *Re May*, and *Re Wilson* (L. R., 1 Prob. 575), references in codicils to revoked wills by their dates were, without the aid of extrinsic evidence, held insufficient to revive the wills, there being no evidence on the faces of the codicils of an intention to revive the wills so referred to. See also *Re Goodenough* (2 Sw. & Tr. 141) ; *Re Duane* (Ib. 590 ; 8 Jur., N. S. 752). *A fortiori*, a devise or bequest inadvertently omitted cannot, on parol evidence, be supplied (see *Mitchell v. Gard*, 3 Sw. & Tr. 75 ; 2 N. R. 337). As to the inadmissibility of evidence of intention, or of mistake in the preparation of a will of real estate, see also *Stanley v. Stanley* (2 J. & H. 491).

When admis-
sible.

Extrinsic evidence is admissible in cases of fraud, and to repel the presumptions of the Courts of Equity, (1) against the intention of a double gift, by reason that the sums and the motive for the gift are the same in

Prec. XX.

trustee for
the time
being enabled
to act.

trusts and powers hereinbefore confided to my trustees herein appointed (who are hereinbefore mentioned or referred to as

Extrinsic
evidence.

both instruments (see *Hurst v. Beach*, 5 Mad. 360), (2) against double portions (*Montague v. Montague*, 15 Be. 565), (3) in favour of ademption of a legacy by advances to the legatee by a person *in loco parentis* (*Trimmer v. Bayne*, 7 Ves. 515; *Hall v. Hill*, 1 Dr. & War. 120; *Kirk v. Eddowes*, 3 Ha. 517; *Hopwood v. Hopwood*, 22 Be. 488), (4) in favour of the satisfaction of a debt by a legacy (*Wallace v. Pomfret*, 11 Ves. 547), and (5) in favour of a resulting trust (*Hall v. Hill*, 1 Dr. & War. 114); but is not admissible to rebut a presumption arising from the construction of the words of the will (*Coote v. Boyd*, 2 Br. C. 527; *Barrs v. Fewkes*, 6 N. R. 355). Extrinsic evidence is admissible to ascertain what was intended to be included within a given description (*Webb v. Byng*, 1 K. & J. 580); or to explain the meaning of signs and symbols employed by the testator (*Kell v. Charmer*, 23 Be. 195), or of nicknames (*Lee v. Pain*, 4 Ha. 251); or to prove that a will was executed on a date other than that which appears upon the face of it (*Reffell v. Reffell*, L. R., 1 Prob. 139). But it is not admissible to enlarge the extent of terms (see *Millard v. Bailey*, L. R., 1 Eq. 378); or to affect the construction of words (but see *Knight v. Knight*, 2 Gif. 616, *sed qu.*); unless a repugnant context presents an obstacle to the acceptance of the words in their strict sense.

—inadmis-
sible.

As to the rule which admits parol evidence in cases of latent ambiguity, but rejects it in cases of patent ambiguity, see 1 Jarm. Wills, 399. See also *Bennett v. Marshall* (2 K. & J. 740); *Re Sayer's Trusts* (L. R., 6 Eq. 319).

Where there are two subjects answering to the description, evidence is admissible to prove which of the two was intended to be given: but evidence of intention to give that to which no part of the description applies is not admissible (*Miller v. Travers*, 8 Bing. 244; 1 Moo. & S. 342); and it would seem that extrinsic evidence is more readily admitted to explain ambiguity in the description of the subject, than of the object, of gift (*Rowlatt v. Easton*, 2 N. R. 262). Evidence is admissible to show which of two persons answering to the same name is intended to take (*Jones v. Newman*, 1 W. Bl. 60; *Reynolds v. Whelan*, 16 L. J., Ch. 434), if the will affords no ground for preferring either (*Doe v. Westlake*, 4 B. & Al. 57; *Douglas v. Fellows*, Kay, 114; *Fleming v. Fleming*, 1 H. & C. 242); evidence is admissible where part of a description applies to each of several persons, and part to none of them (*Careless v. Careless*, 1 Mer. 384). But evidence of intention is inadmissible where part of the description applies to one and part to another: the case of *Doe v. Hiscocks* (5 M. & W. 363) having decided that the only cases in which evidence to prove intention is admissible are those in which the description in the will is unambiguous in its application to each of several objects or subjects (but see *Re Blackman*, 16 Be. 377). Hence it follows that evidence is inadmissible in support of the claim of one to whom no part of the description applies. And it is

—admis-
sible.

—inadmis-
sible.

Prec. XX.

Appoint-
ment of trus-
tees, exe-
cutors and
guardians.

“my trustees”) may be executed by the trustees or trustee for the time being of my will, and, in regard to trustees to be appointed, as well before as after the vesting of the trust property in them. I APPOINT my friends [*names, &c.*] to be trustees and executors of my will; and I appoint my wife, she continuing my widow, and, after her death or marriage, the trustees or trustee for the time being of my will, to be guardians or guardian of the persons and fortunes of my infant children. I REVOKE all prior wills. IN WITNESS, &c.

inadmissible to exclude a person answering the description in the will (*Andrews v. Dobson*, 1 Cox, 425).

See further, on the admissibility of extrinsic evidence, 1 Jarm. Wills, ch. 13; *Duke of Dorset v. Hawarden*, 1 No. Cas. 413; *Anstey v. Nelmes*, 4 W. R. 612; *Re Clergy Society*, 2 K. & J. 615; *Whateley v. Spooner*, 3 K. & J. 542; *McClure v. Evans*, 29 Be. 422; the notes to *Doe v. Hiscocks*, in Tud. L. C. R. P. 819; the treatise of Sir James Wigram “On Extrinsic Evidence;” a Paper by Mr. F. Vaughan Hawkins, Juridical Society’s Papers, Vol. 2, pp. 298–330; and Hawkins, Constr. Wills, 9.

No. XXI.

WILL of a TRADER disposing of Real and Personal Estate in favour of his Wife and Children.—Specific Bequest to Wife of Wearing Apparel, Wines, &c.—Bequest of Railway Shares.—Pecuniary Legacies to Trustees to invest and pay Income to Wife for Life, Capital for Children as she shall by Will appoint; in Default of Appointment, to fall into Residue.—Real Estate and Residuary Personal Estate to Trustees; to permit Wife to carry on Trade, and to occupy and use the Testator's Dwelling-house, Furniture, &c., while any Son shall be under Age, or Daughter under Age and unmarried, with discretionary Power for the Trustees after her Death or Marriage to carry on, or permit her to carry on, the Trade; eventually to sell or convert, and to divide the Produce among all the Children.—Real and Personal Estate to be valued.—Powers to maintain the Children after the Death or Marriage of the Wife out of the general Income; to advance Children Part of their Shares of Valuation; to raise Money by Mortgage, &c.—Option to Sons in succession to purchase Real Estates.—Devise of Mortgage and Trust Estates.—Powers to compound Debts, &c., give Receipts, and appoint Trustees.—Special Exemption of Trustees from Responsibility for the Receipts and Acts of each other.—Appointment of Executors and Guardians.

THIS IS THE LAST WILL AND TESTAMENT of me, [*testator's name, &c.*] I BEQUEATH to my wife [*name*], all the wines, liquors, household stores, fuel and other articles of household consumption which shall at my decease be in or about my then dwelling-house, and all my wearing apparel. I BEQUEATH to my said wife the sum of £—, to be paid to her immediately after my decease, to enable her to purchase mourning for her-

Bequest of
wines, &c. to
wife.

Pecuniary
legacy to
wife.

Prec. XXI.

Bequest of
railway
shares.

self and my family. I BEQUEATH to my said wife twenty shares in the — Railway Company, subject nevertheless to the payment by her of such sums of money or calls thereon as shall become payable after my decease; But I declare that any call or calls which may be in arrear and unpaid at my decease, with all interest thereon, shall be paid out of my personal estate; and that my said wife shall be entitled to the benefit of any call or calls, sum or sums of money, which I may at my decease have paid upon the said shares in advance (a). I BEQUEATH to

Pecuniary

Call on
shares.

(a) In a gift of railway shares upon which calls have been paid in advance, or are still to be paid, it is advisable to express whether or not the legatee is to take the shares as paid up in advance; and on the other hand, upon whom the burthen of the calls due, but unpaid, and of any future calls, is to be imposed.

Payments
requisite to
make testa-
tor's interest
complete.

Where a testator specifically bequeaths shares to a legatee, but further payments are required to make perfect the interest which the testator professes to bequeath—in other words, if there remain any payment to be made for the purpose of constituting the testator a complete shareholder—then the general personal estate of the testator is liable thereto (*Armstrong v. Burnet*, 20 Be. 424; *Day v. Day*, 1 Dr. & S. 261; and see *Moffett v. Bates*, 3 S. & G. 468). And in respect of calls made and due, but remaining unpaid, at the testator's death, there can be no doubt that the testator's general estate is liable.

The earlier cases went to this extent, that the specific legatee of shares was entitled to have them exonerated from all calls, future as well as past (*Blount v. Hipkins*, 7 Sim. 51; see also *Tanner v. Tanner*, 11 Be. 69; *Jacques v. Chambers*, 2 Col. 435; *Wright v. Warren*, 4 De G. & S. 367). But the later decisions make the liability to payment depend upon the fact whether the call was made before or after the testator's death (*Armstrong v. Burnet*, 20 Be. 424; *Addams v. Ferick*, 26 Be. 384; *Day v. Day*, 1 Dr. & S. 261); or, in the case of successive interests in a residue which includes the shares, whether the shares have or have not been separated from the general residue at the date of the call (*Re Box*, 1 H. & M. 552). See also J. Williams, *Real Assets*, 114.

Dividends.

As between tenant for life and remainderman on whom canal shares were settled, a dividend declared before, but payable after, the death of the tenant for life, was held to belong to his estate (*Wright v. Tuckett*, 1 J. & H. 266; *De Gendre v. Kent*, L. R., 4 Eq. 283). And where a testator bequeathed shares in a public company to a legatee for life with remainder over, and a dividend was declared after his death, in respect of profits made in his lifetime, it was held that the dividends formed part of the income and not of the *corpus* of the testator's estate, and belonged to the legatee for life (*Bates v. Mackinley*, 31 Be. 280).

In bequeathing railway or other stock and shares some care is requisite.

the Treasurer for the time being of the — Infirmary the sum of £——, to be applied to the purposes of that institution, such legacy to be paid, in precedence of the other pecuniary legacies hereby bequeathed, out of such part of my personal estate not specifically bequeathed as the law permits to be appropriated by will to charitable purposes (*b*). I BEQUEATH to my friends

—
legacy to a
charitable
institution.

Bequest to
trustees,

If a testator, who has both stock and shares, bequeaths his shares, the stock would not pass, and, conversely, a bequest of the stock would not pass the shares; hence the bequest should be of both stock and shares, if it be the intention to pass both. But if the testator at the date of his will possesses shares only, and these are subsequently converted into stock, the stock representing those shares will pass by a bequest of the shares (see *Oakes v. Oakes*, ante, p. 43). By ss. 61—64 of the Companies Clauses Act, 1845 (8 & 9 Vict. c. 16), shares may be consolidated into stock.

Shares.

As to a bonus on shares, see *Loch v. Venables* (27 Be. 598); *Maclaren v. Stainton* (3 D. F. & J. 202, reversing 27 Be. 460); *Plumber v. Nield* (6 Jur., N. S. 529); *Nicholson v. Nicholson* (9 W. R. 676). As to bonuses on South Sea Stock passing by an assignment of the assignor's reversionary interest in the stock, see *Re Armstrong's Trusts* (3 K. & J. 486). And generally on questions as to the right to bonuses and accretions, see the cases cited in the note to *Gilley v. Burley* (22 Be. 624); *Roberts v. Edwards* (33 Be. 259); *Edmondson v. Crosthwaite* (34 Be. 30); *Re Barton's Trust* (L. R., 5 Eq. 238).

Bonus.

(*b*) Testators are disabled from giving to charity any interest in real estate or money to be laid out therein, by the statute 9 Geo. 2, c. 36, which provides that no hereditaments, or personal estate to be laid out in hereditaments, shall be settled for any estate or interest whatsoever, or charged in trust or for the benefit of any charitable uses, unless by indenture executed in the presence of two witnesses, twelve calendar months before the donor's decease, and enrolled in Chancery (see *Ashton v. Jones*, 28 Be. 460) within six calendar months after execution (except stock in the public funds, which is to be transferred six calendar months before the donor's decease), and unless the same is to take effect in possession, without any reservation, &c. for the benefit of the donor. (See also 9 Geo. 4, c. 85.) But the Act does not extend to gifts to the Universities of Oxford and Cambridge or any of the colleges within them (and see 45 Geo. 3, c. 101); nor to the colleges of Eton, Winchester, or Westminster, for the maintenance of scholars on the foundation (sect. 4). As to colleges founded since the Act, as Downing College, Cambridge, see 1 Ed. 16; 3 Ves. 728; and as to the University of Durham, 4 & 5 Vict. c. 39, s. 13.

As to gifts
in favour of
charity, stat.
9 Geo. 2,
c. 36.

The statute, it is clear, extends to interests of every description in real estate, as leaseholds and mortgages, whether in fee or for years (*Attorney-General v. Graves*, Amb. 155; *Attorney-General v. Tomkins*, ib. 216; *Widmore v. Woodroffe*, ib. 636; *Attorney-General v. Meyrick*, 2 Ves.

Interests to
which the
statute ex-
tends.

Prec. XXI.

— [names, &c.], the sum of £ —, to be paid at the end of — calendar months after my decease, upon the trusts following;

Charity.
9 Geo. 2,
c. 36.

s. 44; *Attorney-General v. Lord Winchelsea*, 3 Br. C. 374; *White v. Evans*, 4 Ves. 21; *Currie v. Pye*, 17 Ves. 462; to a charge on real estate (*Arnold v. Chapman*, 1 Ves. s. 108); to a judgment debt affecting land (*Collinson v. Pater*, 2 R. & M. 344); to arrears of interest on a mortgage of real estate (*Alexander v. Brame*, 30 Be. 153); to the proceeds of growing crops (*Symonds v. The Marine Society*, 2 Gif. 325); to mortgages upon turnpike tolls (*Knapp v. Williams*, 4 Ves. 430, n.; *Howse v. Chapman*, *ib.* 542); or canal tolls (*Re Langham's Trust*, 10 Ha. 446); to mortgages and bonds of improvement commissioners (*Howse v. Chapman*, 4 Ves. 542); to money secured on poor-rates and county-rates (*Finch v. Squire*, 10 Ves. 41); on rates for the improvement of towns levied upon occupiers of houses (*Thornton v. Kempson*, Kay, 592); or on tolls payable under an Act for the improvement of a haven (*Ion v. Ashton*, 28 Be. 379); to bonds secured on parish rates (*Rex v. Bates*, 3 Pri. 341); to rates and duties to be levied from the Liverpool Docks (*Rex v. Winstanley*, 8 Pri. 180; and see *Alexander v. Brame*, 30 Be. 153); to profits arising from the right to lay chains in the Thames to moor ships (*Negus v. Coulter*, Amb. 367). And where a testator had contracted to sell real estate, it was held that his lien on the property for the purchase-money was "an interest in land" within the meaning of the statute (*Harrison v. Harrison*, 1 R. & M. 71). Again, where A., being entitled to certain sums of money which were to be raised by the execution of a trust for sale of real estate, bequeathed all his personal estate to B., and B. bequeathed the residue of his personalty to charity, it was held that these sums, constituting an interest in land at B.'s death, could not be so bequeathed by him (*Attorney-General v. Harley*, 5 Mad. 321; but see *Marsh v. Attorney-General*, 2 J. & H. 61; *Aspinall v. Bourne*, 29 Be. 462), and the Court will not assume in favour of a charity a conversion into pure personalty which the testator was not bound to make (*Lucas v. Jones*, L. R., 4 Eq. 73; see also *Brook v. Badley*, *ib.* 106; 3 Ch. App. 672). Shares in the New River Company are real estate (*Davall v. New River Company*, 3 De G. & S. 394); so also are tolls of a lighthouse (*Attorney-General v. Jones*, 1 M'N. & G. 574); and shares in the navigation of the Avon (*Buckeridge v. Ingram*, 2 Ves. j. 652); and in *Tomlinson v. Tomlinson* (9 Be. 459), Sir John Leach held, that canal shares, which by Act of Parliament were declared to be personal estate, and transmissible as such, were also within the Act; but this case is no longer law (see 1 Jarm. Wills, 202; and *Sparling v. Parker*, *post*, pp. 327, 328). As to real estate in a foreign country, see *Beaumont v. Oliveira* (L. R., 6 Eq. 584).

Where land was conveyed to trustees, for the erection of a church and school, but the donor remained in possession until his death, six years after, the deed of conveyance was held by the Master of the Rolls to be void under the 9 Geo. 2, c. 36, as not taking effect in possession immediately

(that is to say), UPON TRUST to invest the same in their names, in or upon the public stocks or funds, or other Government

—to invest;

after its execution (*Fisher v. Brierley*, 6 Jur., N. S. 159, 8 W. R. 199); but this decision was reversed (1 D. F. & J. 643, 10 H. L. C. 159, 1 N. R. 452). A grant for charitable purposes does not comply with the Act unless the grantor *bonâ fide* parts with all the interest he has in the property (*Wickham v. Marquis of Bath*, L. R., 1 Eq. 17).

Charitable bequests.

A purchase by parish officers of land and houses to be used as a work-house, is not a purchase for a "charitable use" within the 9 Geo. 2, c. 36 (*Burnaby v. Barsby*, 4 H. & N. 690; 7 W. R. 693). And a gift of a house to a "public library"—such library being an institution supported by private subscriptions (and consequently liable to dissolution), governed by persons chosen from amongst the subscribers, and existing only for the benefit of the subscribers—is not a gift to charity within the meaning of the Act (*Carne v. Long*, 4 Jur., N. S. 474), but is void as tending to a perpetuity (2 D. F. & J. 75). And a gift to the churchwardens of a parish of a sum to be invested in government or real securities, and the interest applied in keeping in repair the tombs of the testator and certain of his relatives, is not a charitable use, but is void as tending to a perpetuity (*Richard v. Robson*, 31 Be. 244). See *Hoare v. Osborne* (L. R., 1 Eq. 585) as to a gift to keep in repair a monument in a church, being an ornament, not part of the fabric.

Cases not within the statute.

Freemen of the City of London might, notwithstanding 7 Edw. 1, st. 2, by custom have devised lands in mortmain, and it has been considered that the custom is not affected by 9 Geo. 2, c. 36; see, however, Shelford on Mortmain, p. 257. And the custom, if valid, extends only to lands within the City (*Middleton v. Cator*, 4 Br. C. 409).

Custom of London.

Gifts to a charity by will of East India stock are valid (*Attorney-General v. Giles*, in Shelford's Mortmain, 987, cited 5 Be. 436, 9 Be. 453); and policies of assurance in the following offices, viz. the Equitable, Economic, Law Life, and Amicable, have been held not to be within the Act, so as to invalidate a gift to a charity of the moneys secured by such policies (*March v. Attorney-General*, 5 Be. 433). In a recent case, Sir J. Knight Bruce, V.-C. held, that the shares of a gas-light company might be bequeathed to charitable purposes. He alluded to, but did not wholly rely upon, the provision that the shares should be deemed personal estate, and be transferable accordingly (*Thompson v. Thompson*, 1 Col. 381), and his Honour subsequently decided the same point as to shares in the London Docks and West India Docks (*Hilton v. Giraud*, 1 De G. & S. 183). This has been followed by a similar determination of Lord Langdale, M. R., in regard to gas-light and dock shares, his Lordship grounding his conclusion on the fact, that each shareholder had merely a right to receive dividends and assign his shares, but had not a distinct and separate interest in the land itself, and could not by his act make any part of the land his own (*Sparling v. Parker*, 9 Be. 450; see also *Walker v. Milne*,

Gifts of East India Stock, policies of assurance, shares in public companies, &c., valid.

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securities, or any real or leasehold securities in the United Kingdom, (but not in or upon any other securities), with power to

Charitable
bequests.
Railway
shares.

11 Be. 507). The reasoning of the late Master of the Rolls evidently applies to railway property, and in this point of view is of vast importance. There seems much good sense in the decision, though it contradicts the notion till recently prevalent in the profession, founded on the earlier cases (4 Ves. 43, 542; 10 Ves. 41); it has since been followed in *Ashton v. Lord Langdale* (4 De G. & S. 402), where railway debentures (in the shape of charges upon the tolls, and not being mortgages of the undertaking, or of the lands and buildings of the company), shares in railway, canal, waterworks and banking companies, and scrip shares in projected railway companies, were held not to be within the Act: see also *Myers v. Perigal* (4 D. M. & G. 599); *Re Langham's Trust* (10 Ha. 466); *Edwards v. Hall* (6 D. M. & G. 92); *Linley v. Taylor* (1 Gif. 67, affirmed 2 D. F. & J. 84); and in *Hayter v. Tucker* (4 K. & J. 243), shares in a mine worked on the cost-book principle were held also not to be within the Act. Where the main object of the company is a dealing with land for the purpose of making a profit by it—and the possession of land is not merely ancillary to the general purposes of the company—a bequest of shares in such a company will not be a valid gift to a charity (*Morris v. Glynn*, 27 Be. 218): but this case was not followed in *Entwistle v. Davis* (L. R., 4 Eq. 272).

Exception.

Scotch rail-
ways.

Scotch railway shares are within the exception of sect. 6 of 9 Geo. 2, c. 36 (*Sparling v. Parker*, *ubi sup.*), and were therefore undoubtedly bequeathable to charity, even before the removal of the doubt, now no longer entertained, as to the validity of a gift of shares in the English lines.

As to be-
quests of
money to be
laid out in
land.

Any trust for a charity which cannot be executed without a purchase of land is within the Act; and of this nature is a trust for the erection of buildings, the construction being that a direction to build includes a direction to buy land upon which to build, unless the testator distinctly refers to land already in mortmain (*Attorney-General v. Davies*, 9 Ves. 535; *Pritchard v. Arbouin*, 3 Rus. 456; *Trye v. Corporation of Gloucester*, 14 Be. 173). A bequest to found a chapel is void (*Hopkins v. Phillips*, 3 Gif. 182); but legacies for the "establishment" or "maintenance" or "carrying on" of schools, or for the "endowment" of churches, chapels or schools, may be supported, as not necessarily involving such a purchase, because a house might be hired for the purpose (*Attorney-General v. Williams*, 4 Br. C. 526; *Kirkbank v. Hudson*, 7 Pri. 212; *Johnston v. Swann*, 3 Mad. 457; *Carwood v. Thompson*, 1 S. & G. 409; *Edwards v. Hall*, 6 D. M. & G. 92; *Hartshorne v. Nicholson*, 26 Be. 58); and the fact of the testator expressing his expectation that land would be provided by another, will not invalidate the gift (*Henshaw v. Atkinson*, 3 Mad. 306; and see *Philpott v. St. George's Hospital*, 6 H. L. C. 338); *secus*, it seems, if the bequest is to take effect only in the

vary the investment from time to time for any other of the like nature; And upon further trust to empower my said wife to

—income to wife for life;

event of land being so provided (4 Ves. 543). Money may be bequeathed for the repair and improvement of real estate already devoted to charity, not excepting even the erection of buildings, as by this means no additional land is thrown into mortmain (*Attorney-General v. Parsons*, 8 Ves. 186; *Attorney-General v. Munby*, 1 Mer. 327), as e. g. for the erection of a parsonage-house, where there is glebe (*Sewell v. Crewe-Read*, L. R., 3 Eq. 60; and see *Booth v. Carter*, ib. 757). The meaning of the testator is to be ascertained by the ordinary rules of construction, without regard to the statute, and when the intention has been so ascertained, it must be seen whether it is contrary to the statute (*Tatham v. Drummond*, 5 N. R. 24; and see *Cresswell v. Cresswell*, L. R., 6 Eq. 69). But a legacy given to pay off an incumbrance affecting charity property is considered as not falling within the protection of this principle, and is therefore void (*Corbyn v. French*, 4 Ves. 418); and it is immaterial that the charge on the property is equitable only (*Waterhouse v. Holmes*, 2 Sim. 162; *Alexander v. Brame*, 30 Be. 153).

Charitable bequests to be laid out in land.

Trustees of a charity may lend money upon mortgage of real estate; the statute does not apply to such a case (*Doe v. Hawkins*, 2 Q. B. 212). But a bequest of money to be laid out on a mortgage security for the benefit of a charity has been held to be bad, in spite of the argument that a mortgage of personal chattels or of lands in Ireland (where there is no restriction on charitable dispositions), or in Scotland (where the restriction is less extensive than here), might have been intended; it being considered that this notion savoured too much of refinement, and that a mortgage of real estate in England must be presumed to have been in the testator's contemplation (*Baker v. Sutton*, 1 Ke. 224). But in *University of London v. Yarrow* (1 De G. & J. 72), where the testator bequeathed a fund for founding, establishing and upholding a sanatory institution for birds and animals useful to man, either in London or Dublin, Lord Chancellor *Cranworth* said: "There is more plausibility in the argument that this charity is void under the statute of mortmain, because, as it is said, it points to a foundation which requires the purchase of land. I think it, however, a complete answer to that argument, that the will points only to the purchase of land, either in the neighbourhood of London or in the neighbourhood of Dublin—that neighbourhood of Dublin not having been inserted at all fraudulently to avoid the operation of the statute. Putting it at the worst, the testator cannot be held to have said more than this, that it shall be established at one of two places, thinking both of them lawful, whereas only one is lawful. On this point the doctrine of *Soresby v. Hollins* (9 Mod. 221; cit. 1 Amb. 210, 3 Ves. 50) before Lord *Hardwicke*, is applicable. There have also been many other cases where a testator has given an option to trustees to invest property in one of two ways, the one lawful and the other not, and it has never been held that the statute of mortmain

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receive the annual produce of the same sum of £——, or the investment thereof, during her life; and after her decease, then,

Charitable bequests to be laid out in land.

interfered with the validity of the bequest. I do not wish to commit myself to say, that if there had been no allusion to Ireland, this bequest would have been bad; for I am not at all clear that the establishment of such a sanatory institution necessarily implies the acquiring of land, so as to vitiate the gift under the statute of mortmain." And again in *Mayor of Faversham v. Ryder* (5 D. M. & G. 350), it was held that where trustees have, by the terms of the gift, a discretion to apply the benefit of it in a way which the law allows, or in one which the law disallows, the presumption ought to be that the discretion will be exercised in the former mode: being a choice, it should be presumed to be legally exercised, and the gift therefore is valid and good. See also *Attorney-General v. Mill* (3 Rus. 338); *Dent v. Allcroft* (30 Be. 335); *Graham v. Paternoster* (31 Be. 30); *Re Beaumont's Trusts* (32 Be. 191).

Legal estate.

Where real estate is devised to trustees upon trusts declared (*secus* if the illegal trust be secret, *Sweeting v. Sweeting*, 3 N. R. 240) which are wholly void under the statute of 9 Geo. 2, the devise of the legal estate also fails; but if the trust is for A. for life, with remainder over to the charitable uses, of course the devise in trust is valid *pro tanto*, i. e. during the life of A. (*Young v. Grove*, 4 C. B. 468, 16 L. J., C. P. 216; see also *Wright v. Wilkin*, 2 B. & S. 232). So, where the trust is for various objects, some charitable and some not, the devise of the legal estate is not affected by this partial failure of the trust (*Doe v. Harris*, 16 L. J., Exch. 190).

Land tax.

Land tax which, when redeemed, is by 38 Geo. 3, c. 60, s. 99, to be "deemed personal estate, and transmissible as such," is nevertheless within the Act (see 9 Be. 456); but the Land Tax Redemption Act of 42 Geo. 3, c. 116, s. 50, enables persons to give money by will or otherwise, to be applied in the redemption of the land tax affecting lands settled to charitable uses. And by s. 162, land tax redeemed or purchased under the provisions of the same Act, may be given by deed, will or otherwise for the augmentation of any living. As to impropriation tithes, see 13 & 14 Vict. c. 94, s. 23.

9 Geo. 2, c. 36, does not apply to Scotland, Ireland, India, or colonies.

The statute of 9 Geo. 2, c. 36, does not interfere with bequests of money to be laid out in lands in Scotland (sect. 6; *Mackintosh v. Townsend*, 16 Ves. 330; see also *Attorney-General v. Mill*, 3 Rus. 338), or Ireland (*Attorney-General v. Power*, 1 Ba. & Be. 154), or India (*Mayor of Lyons v. East India Company*, 1 Moo. P. C. 175; and see *Mitford v. Reynolds*, 1 Ph. 185, 192), or the British colonies (*Attorney-General v. Stewart*, 2 Mer. 143), where there is no express legislative enactment in this country that it shall apply to them (*Whicker v. Hume*, 14 Be. 524; affirmed 1 D. M. & G. 506, and 7 H. L. C. 124; where it was held that, notwithstanding 9 Geo. 4, c. 83, s. 24, by which the laws of England are to be applied in the administration of justice in the courts of New South Wales and Van

As to as well the capital as the annual produce thenceforth to become due, IN TRUST for all or any one or more of my children,

—capital for
testator's
children as

Diemen's Land, this so-called Mortmain Act does not apply to land in those colonies). As to charitable gifts in Ireland, see 7 & 8 Vict. c. 97, s. 16.

The enactments of this Act have also been repealed by various Acts of Parliament, in favour of particular charities and objects. Thus, gifts of land by will to the governors of Queen Anne's Bounty are authorized by statutes 2 & 3 Ann. c. 11, and 43 Geo. 3, c. 107; see also 45 Geo. 3, c. 84, 7 Geo. 4, c. 66; as also gifts for the augmentation, under certain limitations, of church lands, by statute 43 Geo. 3, c. 108 (the devise not to exceed five acres), 51 Geo. 3, c. 115, and subsequent Acts (see also 7 Geo. 4, c. 66, and 14 & 15 Vict. c. 71). For the encouragement of such persons as shall be disposed to contribute towards the purposes of the *Act to make better provision for the spiritual care of populous parishes* (6 & 7 Vict. c. 37), it is enacted (by sect. 22, explained by 7 & 8 Vict. c. 94, s. 7, and extended by 14 & 15 Vict. c. 97, s. 24 and 19 & 20 Vict. c. 104, s. 4), that any person having in his own right any estate or interest in any lands, tithes, tenements or other hereditaments, shall have power by deed enrolled or by will, to give to and vest in the Ecclesiastical Commissioners all or any part of his estate or interest in such lands, &c. for the endowment or augmentation of the income of ministers or perpetual curates, or for providing any church or chapel for the purposes, and subject to the provisions of the said Act. Devises of land to the British Museum are authorized by 5 Geo. 4, c. 39; and grants of houses and sites for schools for the education of the poor by 4 & 5 Vict. c. 38; 7 & 8 Vict. c. 37; 12 & 13 Vict. c. 49; 14 & 15 Vict. c. 24; 15 & 16 Vict. c. 49. As to Roman Catholic schools and charities, see 2 & 3 Will. 4, c. 115; 18 & 19 Vict. c. 86, s. 2; 23 & 24 Vict. cc. 134, 136; and by 9 & 10 Vict. c. 59, s. 2, also extended by 18 & 19 Vict. c. 86, s. 2, Jews are, in respect of their schools, places of worship, education, charitable purposes and property, subjected to the same laws as Protestant Dissenters. See also the Charitable Trusts Acts, 16 & 17 Vict. c. 137, 18 & 19 Vict. c. 124, 24 & 25 Vict. c. 9, 25 & 26 Vict. c. 17, 26 & 27 Vict. c. 106, 27 & 28 Vict. c. 13. And by 22 Vict. c. 27, s. 7, personalty not exceeding 1,000*l.* may be given by will to purchase or maintain recreation grounds. See also 23 & 24 Vict. c. 30.

Gifts of land,
valid: Queen
Anne's Boun-
ty, church
lands.

Endowment
or augmenta-
tion of in-
come of
clergy.

British
Museum.
Sites for
Schools.

Recreation
grounds.

As to be-
quests of per-
sonalty to
charity.

The law imposes no restriction whatever on gifts of pure personalty, not directed to be laid out in land, to any legal charitable purpose: and it would be no objection that such purpose is of indefinite duration. Thus, if a testator bequeaths 1,000*l.* Three per Cent. Consols to the vicar of A. for the time being, upon trust to apply the dividends thereof to the most deserving of his poor parishioners not receiving parochial relief, from year to year, for ever, there can be no doubt of the validity of the gift, though created for a purpose capable of enduring and likely to endure for ages; and even in the event of the failure of the objects, the testator's charitable

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she shall appoint;

for such interest or interests, in such shares and in such manner, as my said wife, whether covert or discover, by her will

Charitable bequests.

design would not be wholly frustrated, but would be executed *cy près* under the established doctrine that property once devoted to charity remains so devoted, notwithstanding the failure of its particular objects, the administration devolving upon the Lord Chancellor, either as the commissioner of the Crown, or as the head of the Court of Chancery. Here then we have an instance of a perpetuity, not only tolerated by the law, but the object of its special sanction and encouragement, which, it is clear, would be equally extended to lands conveyed to charitable uses by a deed enrolled under statute 9 Geo. 2, c. 36. It is clear, however, that a trust for accumulation in favour of a charity is not allowed to exceed the limits imposed by the Thellusson Act (*Martin v. Margham*, 14 Sim. 230; and see *post*, p. 350).

Accumulations.

Bequests to Dissenters, Romanists, Jews.

As to bequests to Protestant Dissenters, see *Attorney-General v. Baxter*, 1 Ver. 248, 2 Ver. 105; *Attorney-General v. Cock*, 2 Ves. s. 273; *Shrewsbury v. Hornby*, 5 Ha. 406; *Attorney-General v. Lawes*, 8 Ha. 32; to Roman Catholics, *West v. Shuttleworth*, 2 M. & K. 684; *Walsh v. Gladstone*, 1 Ph. 29; *Attorney-General v. Gladstone*, Ib. 290, 13 Sim. 7; *Heath v. Chapman*, 2 Drew. 417; *Re Blundell's Trusts*, 30 Be. 360; to Jews, *Straus v. Goldsmid*, 8 Sim. 614; *Re Michel's Trust*, 28 Be. 39.

The law regulating charitable gifts certainly exhibits a singular mixture of opposite principles. Impediments are thrown in the way of devoting land to charitable uses; but, if those impediments are overcome, the land thus appropriated is never suffered to revert to the donor or his representatives on account of the failure of the charitable objects, or (which is still stronger) even on account of the donor's omission originally to describe the objects with sufficient definitiveness—circumstances which, by the ordinary rule of construction, would have been fatal to the gift. It should be observed, that though a gift to charity will be sustained, notwithstanding a want of specification of objects, yet it must be distinctly shown that charity is the intended destination; and, if this be uncertain, the doctrine in question lends no support to the intended disposition, as in the case of a trust for such charitable or other purposes (*Ellis v. Selby*, 7 Sim. 352, affirmed 1 M. & C. 286), or even for such charitable or public purposes as A. shall appoint (*Morice v. Bishop of Durham*, 9 Ves. 399, 10 Ves. 522; *Vezey v. Jamson*, 1 S. & S. 69); in which cases, the testator having evinced an intention to create a trust, but without any definite indication of his purpose, the beneficial interest in the property is undisposed of.

Wide range of objects, no objection to charitable bequest.

It is no objection, however, that the charity embraces an almost indefinite range of objects, of which a striking example is afforded by a recent case, where a bequest to the Queen's Chancellor of the Exchequer for the time being, to be by him appropriated to the benefit and advantage of Great Britain, was held to be valid as to the pure personalty, though void, under the act of 9 Geo. 2, with respect to the personal estate savouring of the

or any codicil thereto, shall appoint (but so that the vesting be not postponed beyond twenty-one years after the decease of my said wife), and in default of appointment, upon the trusts hereinafter declared concerning the residue of my personal estate: BUT I DECLARE that if, during the life of my said wife, the said annual produce, or any part thereof, shall, by any means whatever, vest in or become payable to any other person or persons than my said wife, then the trust hereinbefore contained in her favour shall, as to the annual produce which shall so vest in or become payable to any other person or persons thenceforth absolutely cease; and the same annual produce shall, during the remainder of her life, be applied in the same manner as the same would be applicable if she were dead without having exercised the power of appointment hereinbefore given to her. I DEVISE all the real estate, and bequeath the residue of the personal estate, of or to which I shall be seised, possessed or entitled at my decease, or over which I shall at that time have any disposing power (c), unto and to the use of the said

—in default of appointment, to fall into residue.
Cesser of wife's life interest on alienation.

Devise of real and bequest of residue of personal estate to trustees, upon trust,

realty (*Nightingale v. Goulburn*, 5 Ha. 484; 2 Ph. 594). And in *Whicker v. Hume* (7 H. L. C. 124), where the bequest was to trustees in their discretion, "for the benefit and advancement and propagation of education and learning in every part of the world as far as circumstances will permit," this was held to be a valid gift to charity. See also *Dolan v. Macdermot* (L. R., 3 Ch. 676).

Charitable bequests.

See further, on charities and the operation of 9 Geo. 2, c. 36, the case of *Corbyn v. French*, and the notes thereto, in Tud. L. C. R. P. 456—506; 1 Jarm. Wills, ch. 9; *Jeffries v. Alexander*, 8 H. L. C. 594; 7 Jur., N. S. 221; *Moss v. Cooper*, 1 J. & H. 352; *Thornton v. Howe*, 31 Be. 14.

(c) Powers, whether general or special, are well exercised by an instrument of the required kind (testamentary or other) which refers either to the power itself, or to the very property which is the subject-matter of the power. See *Cooke v. Cunliffe* (15 Jur. 1076); *Harvey v. Stracey* (1 Drew. 73, 115); *Pomfret v. Perring* (18 Be. 622); *Noel v. Noel* (4 Drew. 624); *Re David's Trusts* (Joh. 495).

As to the exercise of powers of appointment.

General testamentary powers are well executed by a general testamentary disposition—before 1 Vict. c. 26, provided there were no other property upon which the general disposition could operate; see *Innes v. Sayer* (16 Jur. 21); *Attorney-General v. Wilkinson* (L. R., 2 Eq. 816)—and after 1 Vict. c. 26, unless a contrary intention appear by the will; see sect. 27, *ante*, pp. 48—51.

General testamentary powers.

But no mere general gift, however unlimited in its terms, unless it refer either to the power or to the property, will execute a special (or particular)

Special testamentary powers.

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—to permit wife, during widowhood, &c. to carry on trade,

—and to occupy testator's dwelling-house, &c.;

—trustees to pay rent and taxes during wife's occupation;

—in the

[*trustees*], their heirs, executors, administrators and assigns respectively, UPON TRUST, so long as my said wife shall continue my widow, and any son of mine shall be under the age of twenty-one years, or any daughter of mine shall be under that age, not having been married, to permit my said wife to carry on my business of — at — aforesaid, and to employ for that purpose such part of my real and personal estate as shall constitute the capital employed therein at my decease, with any additional capital which my trustees shall think requisite; And also to permit her, during the same period (whether she shall carry on such business or not) to have the occupation, use and enjoyment of the leasehold messuage or tenement wherein I now reside, at — aforesaid, with the shop, garden and appurtenances, and the household furniture, implements and utensils, plate, linen, china, and glass, which shall be in or about the same messuage and premises at my decease; And I declare that the rent and taxes payable in respect of the said leasehold premises during my wife's occupation thereof shall be paid out of my estate, but she shall bear the expense of repairing the same premises, and insuring the same, and my effects therein, against fire; And in case my said wife shall die or marry while

Execution of powers.

power (except, perhaps, where the will would fail altogether unless it operated as an execution of the power; see *Davies v. Davies*, 7 W. R. 85); but a wrong reference to or a misdescription of the instrument under which the power is derived will not invalidate the execution (*Re Wilmot*, 29 Be. 644). The Wills Act makes no alteration in the law respecting special powers; see sect. 27, *ante*, p. 48, and the note thereto, p. 51.

As to the formalities of execution.

A testamentary power, whether general or special, purporting to be exercised by will dated before 1838, required to be executed with all the formalities prescribed by the instrument creating the power. But a testamentary power exercised by will dated after 1837, requires to be executed with the formalities prescribed by 1 Vict. c. 26, s. 9 (*ante*, p. 9), for the valid execution and attestation of wills; and with all other (if any) formalities (not relating to the ceremony of execution and attestation) prescribed by the instrument creating the power (*vide* sect. 10, *ante*, p. 24).

No appointment and no gift in default.

Where there is a power to appoint among certain objects, but no appointment is made, and there is no gift in default of appointment, the Court will sometimes imply a gift to the objects of the power equally (*Brown v. Higgs*, 4 Ves. 708; 5 Ves. 495; 8 Ves. 561; *Burrough v. Philcox*, 5 M. & C. 73). But see also *Re Eddowes* (1 Dr. & S. 395); *Goldring v. Inwood* (3 Gif. 143). As to the period for ascertaining the class, when the objects of the power are a class, see *Re White's Trusts* (Joh. 656).

any son of mine shall be under the age of twenty-one, or any daughter of mine shall be under that age, not having been married, then UPON TRUST, in the discretion of my trustees, either to discontinue or to carry on the said business, or cause the same to be carried on under their inspection and control, so long as any son of mine shall be under the age of twenty-one years, or any daughter of mine shall be under that age, not having been married; and for that purpose to employ as capital any part of my real or personal estate, with liberty, if my trustees shall think fit, to permit my said wife, notwithstanding her marriage, to continue to enjoy the benefit of the trust hereinbefore contained in her favour during widowhood, subject to any restrictions or modifications which my trustees shall deem advisable; And subject to the trusts aforesaid, As to my said real and residuary personal estate, UPON TRUST, with the consent in writing of my said wife, while she shall continue my widow, and any son of mine shall be under the age of twenty-one years, or any daughter of mine shall be under that age not having been married, and afterwards in the discretion of my trustees, to sell such real estate by public sale or private contract, together or in parcels, and to sell, convert and get in such residuary personal estate; and to execute and do such assurances and acts as may be desirable or necessary for carrying any and every such sale into effect; AND UPON FURTHER TRUST, with such consent or in such discretion as last aforesaid, to invest the moneys to arise under the trust last aforesaid, in the names of my trustees, in or upon the public stocks, funds or securities of the United Kingdom, or any real or leasehold securities in the United Kingdom, but not in or upon any other investments, and to vary the investment from time to time for any other of the like nature; AND UPON FURTHER TRUST to permit my said wife to receive the yearly produce of the trust fund constituted of such moneys, or of the stocks, funds or securities whereon the same shall be invested, so long as she shall continue my widow, she thereout maintaining, clothing, educating and bringing up my sons for the time being under the age of twenty-one years, and my daughters for the time being under that age not having been married; And after the determination of the trust lastly hereinbefore contained, then, As to the same trust fund and the yearly produce thenceforth to

—
event of
wife's death
or marriage,
trustees may
carry on
trade.

Subject to
previous
trusts, to sell
and convert
residuary real
and personal
estate, and
invest pro-
ceeds;

—to permit
wife, during
widowhood,
to receive the
income,
bringing up
children;

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—capital for
children
equally, with
benefit of
accruer.

accrue due for the same, IN TRUST for all my children in equal shares ; and if any of them, being a son or sons, shall die under the age of twenty-one years (*e*), or being a daughter or daughters, shall die under that age without having been married, then as to the share or shares, original and accruing, of the child or children so dying, In trust for the others or other of my children, and, if more than one, in equal shares ; But if no child of mine, being a son, shall attain the age of twenty-one years, or being a daughter, shall attain that age or be married, THEN UPON TRUST to permit my said wife to receive the yearly produce of the said trust fund during her life ; and after her decease, as to the same trust fund and the yearly produce thereof, IN TRUST for such person or persons as at the time of her decease would be my next of kin, and entitled to my personal estate under the statutes for the distribution of the personal estate of intestates, if I were to die immediately after her decease intestate (*f*), such persons, if more than one, to take distributively, according to the said statutes. I DECLARE that if any one or more of my children shall die in my lifetime, and any issue of such child or children respectively so dying shall be living at my death, then the share and shares original and accruing to which such child

Substitution
of issue for
child of tes-
tator pre-
deceasing
him.

(*e*) In this case the gift being to the children as a class, those only can participate who survive the testator (see *ante*, sect. 33, p. 56 ; see also pp. 203—208). To provide to some extent for the death of a child in the testator's lifetime leaving issue at his death, a clause of substitution is added ; see note (*g*), *post*, p. 337.

Gifts to next
of kin.

(*f*) In framing gifts to next of kin, it is of importance to express whether it is to embrace the persons answering the description at the time of the testator's decease, or when the gift takes effect in possession. (See *Downes v. Bullock*, 25 Be. 54, 9 H. L. C. 1 ; *Re Greenwood's Will*, 3 Gif. 390 ; *Moss v. Dunlop*, Joh. 490 ; *Lee v. Lee*, 1 Dr. & S. 85 ; *Re Lang's Will*, 9 W. R. 589 ; *Royds v. Royds*, 1 N. R. 516.) It is also necessary to show that the persons who would be entitled under the Statutes of Distributions are the beneficiaries referred to by the testator (see *ante*, pp. 183—187) ; it should also be shown whether they are to take as joint-tenants or tenants in common (see *Horn v. Coleman*, 1 S. & G. 169 ; *Re Greenwood's Will*, 3 Gif. 390 ; *Re Ranking's Trusts*, L. R., 6 Eq. 601) ; and if as tenants in common, then that they are to be entitled in the shares prescribed by the statute, (as doubtless is commonly the intention), as otherwise they would, though of different degrees, take in equal shares (*Richardson v. Richardson*, 14 Sim. 526 ; *Smith v. Palmer*, 7 Ha. 225 ; but see *Martin v. Glover*, 1 Col. 269 ; *Booth v. Vicars*, 1 Col. 6).

or children so dying, if living at my decease, would have been entitled under the trusts aforesaid, shall be held by my trustees, UPON TRUST for such persons and in such manner as the same would have been held if such child or children respectively had died immediately after my decease (*g*). I DIRECT my trustees, within — calendar months after my decease, to cause my said real and personal estate to be valued by two competent valuers, or, if such valuers shall disagree, by a third valuer, to be named by them before entering upon the valuation, as their umpire. I DECLARE that it shall be lawful for my trustees, in their discretion, either during the continuance or after the determination of the trusts hereinbefore contained antecedent to the trust in favour of my children, to raise and apply, in or towards the advancement in life of each or any child of mine, by apprenticing such child to any trade or business, or otherwise, any part or parts of his or her share of my trust estate, not exceeding in the whole £—. I DIRECT that, notwithstanding the trusts hereinbefore contained antecedent to the trust in favour of my children, my trustees shall, as and when, during the subsistence of all or any of such antecedent trusts, any and every child of mine, being a son, shall attain the age of twenty-one years, or, being a daughter, shall attain that age or be married, raise and pay to such child, in part satisfaction of his or her share of my trust estate, such sum as shall amount, or, as the case may be, shall, together with the money, if any, previously advanced for the benefit of such child, under the provision for advancement hereinbefore contained, be equal to two-third parts in value of the original share of such child of my said trust estate, estimated at the surplus of the valuation hereinbefore directed to be made, after deducting the amount of my debts, funeral and testamentary expenses, and the pecuniary

Valuation to be made of residuary estate.

Power to advance children, notwithstanding the prior trusts.

Sons at twenty-one, and daughters at twenty-one or marriage, to receive part of their shares;

(*g*) This substitutionary clause will make the share of each child dying in the testator's lifetime, and leaving issue surviving the testator, part of the estate of that child, and will not substitute the issue for the child (sect. 33, *ante*, p. 56). The share in question will devolve according to the child's will, if any, or, if none, will be distributable amongst the child's next of kin according to the statutes, subject, of course, to the child's debts. If it is the intention that the share should go to the issue of the child in question free from his or her debts and dispositions, such issue should be expressly substituted.

Substitution of issue for child predeceasing testator.

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—with power to trustees to retain the same as capital for carrying on the business.

Provision for maintenance of children during minority.

Power to trustees to raise money by sale or mortgage.

legacies hereinbefore bequeathed ; But my trustees shall be at liberty, with the consent of the child for whom such sum shall be raiseable, to retain the same, or any part thereof, to be employed as capital in carrying on my said business, and allow interest thereon at the rate of — per cent. per annum, by half-yearly payments. I DECLARE that it shall be lawful for my trustees, after the trust hereinbefore contained for payment to my said wife of the yearly produce of my said trust fund shall determine by her death or marriage, and thenceforth, so long as any child of mine, being a son, shall be under the age of twenty-one years, or being a daughter shall be under that age, not having been married, to apply the whole or any part of the yearly produce of the same trust fund for the common maintenance (*h*), education and bringing up of my son or sons for the time being under that age, not having been advanced in life as aforesaid, and my daughter or daughters for the time being under that age, not having been married or advanced as aforesaid ; and for that purpose, in the discretion of my trustees, to suspend the payment of any sum or sums of money which any child or children shall, under the provision lastly hereinbefore contained, have become entitled to receive, and the payment of interest thereon. I DECLARE that it shall be lawful for my trustees, notwithstanding any of the trusts hereinbefore contained, to raise any money which shall be requisite to answer the deficiency, if any, of my personal estate not hereinbefore specifically bequeathed, to satisfy my debts, and funeral and testamentary expenses, and the pecuniary legacies hereinbefore bequeathed, or to answer the aforesaid provision for the advancement of my children, or the aforesaid provision for part payment of their respective shares, by selling, mortgaging (either with or without a power of sale) (*i*), or charging my

(*h*) This clause varies materially from the statutory form given in 23 & 24 Vict. c. 145, s. 26, *ante*, p. 138.

Power to mortgage. As to validity of insertion of power of sale in the instrument exercising such power.

(*i*) The decisions of the Court are at variance, with respect to the validity of powers of sale inserted in mortgages made by trustees who have a power to mortgage. In *Bridges v. Longman* (24 Be. 29), the M. R. decided in favour of the validity of such powers of sale, on the ground that the trustees are thereby enabled to obtain better terms, and that a power of sale has now become an integral and usual part of every mortgage. See also *Cook v. Dawson* (29 Be. 128). But in *Saunders v. Richards* (2 Col.

real and personal estate, or any part or parts thereof, or by all or any of those means, in such manner as my trustees shall think expedient. And that the costs of and incident to the said sales and mortgages, and of and to any transfers, not only of the same mortgages, but of any other mortgages upon my estate which in the opinion of my trustees may from time to time be necessary, shall be charged upon or paid out of the corpus of my estates. I DECLARE that any sale of my said real and personal estate may be effected by my trustees either by public auction or private contract, with power to my trustees to make any special or other conditions of sale, as to the title or evidence of title, or otherwise, and with power to buy in the premises at any sale by auction, or to rescind any contract, either on terms or gratuitously, and to resell the premises without being answerable for any consequent loss. I DECLARE that my trustees shall not, in the lifetime of any son or sons of mine who shall have attained the age of twenty-one years, sell my real estate, or any part thereof, until the same shall have been offered by my trustees, in writing under their hands, to such son, if only one, or to such sons, if more than one, successively, according to the priorities of their respective births, at a valuation to be made by two valuers named by my trustees, or if such valuers shall disagree, then to be made by a third valuer, to be named by the other two before they shall enter upon the valuation, as their umpire; nor until such son or each and every of such sons shall have refused or omitted to notify, in writing under his hand, to my trustees, his acceptance of the offer, within ten days after the making thereof; but no purchaser under my will shall be obliged to take notice of this direc-

Testator's sons to have liberty of pre-emption at a valuation.

568) and *Clarke v. Panopticon Company* (4 Drew. 26), *V.-C. Knight Bruce* and *Kindersley* respectively held, that (unless expressly authorized) a power of sale could not be inserted in a mortgage under a power to mortgage. See also *Whitmore v. Drake* (19 L. T. 243); *Pearson v. Benson* (28 Be. 600). In *Russell v. Plaice* (18 Be. 21), a power of sale given by an administratrix in a mortgage executed by her of her intestate's leaseholds for years was held by the M. R. to be valid; and in *Selby v. Cooling* (23 Be. 418), the M. R. directed a power of sale to be inserted in a mortgage of an infant's estate. See also *Leigh v. Lloyd* (2 D. J. & S. 330), as to the implication of a power of sale in a mortgage.

As to the statutory incidents of a mortgage, see 23 & 24 Vict. c. 145, part 2, ss. 11—24.

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Power to trustees to give discharges.

Purchasers and mortgagees not required to ascertain the propriety of sale or mortgage.

Power to trustees to compound debts, &c. ;

tion (*k*). I DECLARE that the receipts of my trustees to purchasers and others, for moneys paid to my trustees, shall be sufficient discharges for the same, and from all liability to see to the application thereof; and that no purchaser or mortgagee shall be obliged to ascertain the occurrence or existence of any event or purpose in or for which a sale, mortgage or charge is hereinbefore authorized to be made, or to inquire into or take notice of any matter connected with the propriety or regularity of any sale, mortgage or charge. I EMPOWER my trustees to compound, or allow time, or accept security, real or personal, for the payment of debts owing to my estate, and to adjust, by

Option to purchase during given time.

Option exercised after death of owner.

(*k*) It is not very infrequent to find, in leases of freehold estate, a clause which gives the lessee an option to purchase the demised property, either pending the term, or within a shorter fixed period. If the lessee exercise his option during the life of the lessor, of course the purchase-money goes, on the death of the lessor, testate or intestate, to his personal representatives. And if the option be exercised after the death of the lessor, and the lessor die intestate or have only generally devised his real estate, the purchase-money still goes to the personal representative of the lessor, and not to his heir or devisee (*Lanes v. Bennett*, 1 Cox, 167; *Townley v. Bedwell*, 14 Ves. 591; *Weeding v. Weeding*, 1 J. & H. 424. See also *Collingwood v. Row*, 5 W. R. 484; *Goold v. Teague*, 7 W. R. 84; *Knollys v. Shepherd*, cited in *Wall v. Bright*, 1 J. & W. 499; and compare *Wright v. Rose*, 2 S. & S. 323). But if the lessor, by will made after the contract giving the option to purchase, specifically devises the property without referring to the contract, then the purchase-money goes to the devisee, whenever the option is exercised (*Drant v. Vause*, 1 Y. & C. 581; *Emuss v. Smith*, 2 De G. & S. 722).

Intermediate rents.

But, in the case above considered, the rents accruing due in the interval between the lessor's death and the exercise by the lessee of his option to purchase, belong to the heir or devisee (*Townley v. Bedwell*, 14 Ves. 591; see also *Shadforth v. Temple*, 10 Sim. 184; *Lumsden v. Fraser*, 12 Sim. 263; *Ex parte Walker*, 1 Drew. 508; *Ex parte Hardy*, 30 Be. 206).

Legacy duty.

Where real estate was devised to A., with an option to B. to purchase the same for 10,000*l.*, and the option was exercised, legacy duty was held payable on the 10,000*l.* (*Attorney-General v. Wyndham*, 1 H. & C. 563, 8 Jur., N. S. 1182).

Compare 1 Jarm. Wills, 50; and see also, as to options to purchase or rights of pre-emption, *Pegg v. Wisden*, 16 Be. 239; *Brooke v. Garrod*, 2 De G. & J. 62; *Re Cant's Estate*, 4 De G. & J. 503; *Woods v. Hyde*, 10 W. R. 339; *Evans v. Stratford*, 2 H. & M. 142; *Lord Ranelagh v. Melton*, 2 Dr. & S. 278; *Weston v. Collins*, 5 N. R. 345; *Moss v. Barton*, 35 Be. 197; *Buckland v. Papillon*, *ib.* 281; *Hale v. Bushill*, *ib.* 343.

arbitration or otherwise, disputes in relation thereto, or in relation to debts or demands against my estate [*or*, I EMPOWER my trustees to pay any debts owing by me or claimed as due from me, upon any evidence which they shall think sufficient; and to accept any security, real or personal, for any debt or debts owing to me, and also to compromise or compound any debt or debts owing to me, and to allow such time for the payment thereof as to them shall appear reasonable, and to adjust and settle my partnership accounts and concerns with my partner [*name*], which it is my wish should be settled in the most liberal manner]; And I empower my trustees in the sale or conversion of my trust estate, and in the conduct and management of my trade as aforesaid, to give such credit as they shall think proper. I DEVISE to the said [*trustees*], and their heirs, all the estates which may happen at my decease to be vested in me as mortgagee or trustee, subject to the equities and upon the trusts affecting the same respectively. AND in case my trustees herein named, or either of them, shall die in my lifetime, or shall on my decease renounce the trusts of my will, or in case any trustee for the time being of my will shall die, or become unwilling, unable or unfit to act, or shall cease to reside in England, or desire to retire from the office, Then I EMPOWER my said wife, or, if she shall be dead, the surviving or continuing trustee, or, in default of any such, then the retiring trustee, or the proving executors or executor for the time being, or the administrators or administrator for the time being, of the last deceased trustee, as the case may be, by any writing, to nominate a new trustee or new trustees, for the purpose of filling the vacancy or vacancies caused in manner aforesaid; and such new trustee or trustees shall from time to time have the same powers in all respects as the trustees hereby appointed. AND I DIRECT that the respective trustees for the time being of this my will shall be responsible for so much money only as shall come to their own respective hands, and that they shall not be answerable for involuntary losses, or for the acts or defaults of each other, and particularly that any trustee who shall pay over to his co-trustee, or shall do or concur in any act enabling his co-trustee to receive any moneys, for the general purposes of my will, or for any definite purpose authorized by my will, shall not be obliged to see to the due application thereof, nor

—
[Another form.]

—to give credit.

Devise of mortgage and trust estates.

Power to appoint trustees.

Indemnity to trustees.

Prec. XXI.

shall such trustee be subsequently rendered responsible by an express notice or intimation of the actual misapplication of the same moneys (*l*); but this clause shall not restrict the power

Remarks on clauses indemnifying trustees.

(*l*) The efficacy of this indemnity clause was tested in the case of *Wilkins v. Hogg* (3 Gif. 116; affirmed by Lord *Westbury*, 31 L. J., Ch. 41, 10 W. R. 47); the trust fund was handed over by two trustees to their co-trustee for investment, but was immediately misapplied by him, and it was held that the two were not liable to make good the fund. The propriety of inserting so extensive a clause of indemnity is questioned, 4 Dav. Conv. by Waley, 52.

The ordinary indemnity clauses have only a slight effect in restricting the responsibility of trustees; for instance, if an executor or trustee, on a representation by his co-executor or co-trustee that money is wanted to carry on the affairs of the trust, joins in a power of attorney for the sale of stock, or in the reconveyance of a mortgage, and permits the proceeds to go into the hands of the latter, the concurring executor or trustee would not be discharged from the duty of seeing to the due application of the money by a declaration in the will that the trustees shall not be answerable one for the other, but each for his own receipt and default only, or couched in other such common-place terms (see *Brice v. Stokes*, 11 Ves. 319; *Bone v. Cook*, M'Cl. 163; *Hanbury v. Kirkland*, 3 Sim. 265). As to the liability of a trustee in respect of a breach of trust committed by his co-trustee, see *Townley v. Sherborne*, and *Brice v. Stokes*, and the notes thereto, in 2 Tud. L. C. Eq. 778—836. The trustee's responsibility is considered to arise (to resume the instance above), not from his mere junction in the act by which the money was placed at the disposal of the co-trustee, but from want of vigilance in preventing its subsequent misapplication, from which the clause in question does not profess to exempt him. In short, such clauses are viewed as part of the formal phraseology of the will, and not as indicating any special intention to interfere with the rules of equity which regulate the responsibility of trustees.

Notwithstanding 22 & 23 Vict. c. 35, s. 31 (*ante*, p. 112), many cases will occur in which special indemnity clauses will be requisite, in order to give the trustees additions to their powers which it is convenient they should possess; *e. g.* the trustees (in addition to the usual indemnity and right of re-imbursement) may often with propriety be authorized to dispense wholly or partially with the production or investigation of the lessor's title to leaseholds (*ante*, p. 217, n. (*d*)), or otherwise to accept less than a marketable title, upon the purchase or taking in exchange, or upon enfranchisement, or lending money upon security of any hereditaments, and without being responsible for any loss thereby incurred.

The usual trustees' indemnity clause does not exonerate a trustee from the consequences of a breach of trust or connivance at a breach of trust (*Brumridge v. Brumridge*, 27 Be. 5).

As to a trustee being entitled to reimburse himself any expenses conse-

of any trustee to require from his co-trustee an account of the application of moneys in his hands, or to insist on his replacing

quent on the execution of the trust, unless they are occasioned by his own default, but that no allowance can be made to him for his care or trouble, see *Robinson v. Pett*, and the notes thereto, in 2 Tud. L. C. Eq. 219; and see notes (f) and (g), *ante*, p. 318.

If the consideration, that the preservation of trust property is thrown upon each trustee, were allowed its due weight, it would greatly alter the usual mode of conducting trust affairs, which is for one trustee to assume the entire or principal management, the rest taking no active part, but concurring, without inquiry, in the execution of deeds and in all other acts which the managing trustee suggests to be requisite for enabling him to proceed in the execution of the trusts. When a testator intends that the trust business shall be thus managed, it seems to be proper that he should render the course a safe one to the less active trustee by a special clause of indemnity; but as such clauses operate to shift the loss consequential on a breach of trust from a co-trustee to the cestuis que trust, and thereby to impair the security arising from a plurality of trustees, they ought not to be inserted as matter of course.

Remarks on the management of trust affairs.

An important extension of the judicial protection afforded to trustees was effected by the 10 & 11 Vict. c. 96, "for better securing trust funds, and for the relief of trustees," amended by 12 & 13 Vict. c. 74, which enables the major part of trustees to pay money into Court without the concurrence of the minority.

10 & 11 Vict. c. 96.

12 & 13 Vict. c. 74.

The 22 & 23 Vict. c. 35, also contains the following enactment (sect. 30):—"Any trustee, executor or administrator, shall be at liberty, without the institution of a suit, to apply by petition to any Judge of the High Court of Chancery, or by summons upon a written statement to any such Judge at Chambers, for the opinion, advice or direction of such Judge on any question respecting the management or administration of the trust property or the assets of any testator or intestate; such application to be served upon, or the hearing thereof to be attended by, all persons interested in such application, or such of them as the said Judge shall think expedient; and the trustee, executor or administrator acting upon the opinion, advice or direction given by the said Judge, shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee, executor or administrator, in the subject-matter of the said application: provided nevertheless that this Act shall not extend to indemnify any trustee, executor or administrator, in respect of any act done in accordance with such opinion, advice or direction as aforesaid, if such trustee, executor or administrator shall have been guilty of any fraud or wilful concealment or misrepresentation in obtaining such opinion, advice or direction; and the costs of such application as aforesaid shall be in the discretion of the Judge to whom such application shall be made."

22 & 23 Vict. c. 35, s. 30.

Acting under the advice of counsel does not exonerate trustees from the

Prec. XXI.

Appointment
of executors
and guar-
dians.

moneys misapplied by him. AND I EMPOWER my trustees to retain and allow to each other the costs and expenses incurred in the execution of the trusts, or in relation thereto. I DECLARE that the powers and discretions hereinbefore given to "my trustees" shall be vested in and exerciseable by the trustees or trustee for the time being of my will. I APPOINT my said trustees [*names*] to be executors of my will, and I appoint my said wife (she continuing my widow) and my said trustees to be guardians of my children during their respective minorities; And I REVOKE all former wills. IN WITNESS, &c.

22 & 23 Vict.
c. 35, s. 30.

consequences of their acts (*Doyle v. Blake*, 2 Sch. & Lef. 231; *Re Knight's Trusts*, 27 Be. 45). But an order of the Court, in the absence of fraud or suppression, indemnifies a trustee who acts in obedience to it (*Lewin, Trusts*, 289). The section just quoted does no more than provide a cheap and speedy means of obtaining such an order; and the costs of any fair application under the section will be thrown upon the trust estate. In the following cases the opinion of the Court was expressed for the guidance of the trustees: *Re Muggeridge's Trusts* (Joh. 625); *Re Simson's Trusts* (1 J. & H. 89); *Re Green's Estate* (1 Dr. & S. 68); *Re Jacob's Will* (29 Be. 402); *Re Green* (2 D. F. & J. 121); *Re Lang's Will* (9 W. R. 589); *Re Peyton's Settlement* (30 Be. 252); *Re Box* (1 H. & M. 552); *Re Hellmann's Will* (L. R., 2 Eq. 363); *Re Kershaw's Trusts* (6 Eq. 322). But the Court will not, on petition under this section, entertain an important and difficult question, or do anything to affect the rights of parties to property; the object of the Act is to assist trustees in the execution of their trusts as to matters of discretion in cases relating to the management and investment of trust property which do not require the Court to go into details (*Re Mockett's Will*, Joh. 628; *Re Barrington's Settlement*, 1 J. & H. 142; *Re Lorenz's Settlement*, 1 Dr. & S. 401; *Re Hooper*, 29 Be. 656; *Re Evans*, 30 Be. 232).

23 & 24 Vict.
c. 38, s. 9.

Upon any application under the above section for the advice of a Judge, "the petition or statement shall be signed by counsel, and the Judge by whom it is to be answered may require the petitioner or applicant to attend him by counsel, either in Chambers or in Court, where he deems it necessary to have the assistance of counsel." (23 & 24 Vict. c. 38, s. 9.)

No. XXII.

WILL of a MARRIED MAN, engaged in Trade as a Builder, &c., providing for a Wife and Children.—Real and Personal Estates vested in Trustees for Sale and Conversion, with a Power to raise Money by Mortgage of the Real Estate.—Income to be applied in Payment of an Annuity to Wife during Widowhood, for the Support of herself and Children; a reduced Annuity for Wife on Second Marriage; after her Death or Marriage, Annual Allowances for Maintenance of Children; Surplus to accumulate till youngest Child attains Twenty-one.—Capital and Accumulations to Testator's Children and remoter Issue living at the Determination of the Trust for Accumulation, per Stirpes; if none, for Testator's Brothers and Sisters.—Powers to Trustees to advance Testator's Children before the Period of Distribution; to maintain and advance remoter Issue; to purchase Land, take Building Leases, let Furnished Lodging-houses, and grant Leases; to make Allotments of Real Estate to Objects entitled in Distribution.—Provisions relating to Testator's Trade.—Right of Pre-emption given to Testator's Partner as to Share of Partnership Business; Powers to settle Accounts, sell Stock, &c., lend Money to Testator's Son on Bond.—Devise of Freehold Mortgage and Trust Estates.—Devise of Copyhold Mortgage and Trust Estates to Uses.—Powers to give Receipts and appoint Trustees.—Appointment of Executors and Guardians.

THIS IS THE LAST WILL AND TESTAMENT of me, [*testator's name, &c.*]. I BEQUEATH to my dear wife [*name*], all the furniture, plate, linen, china, glass, pictures, prints, wines, Bequest to wife of furniture, &c. in dwelling-house.

Pr. XXII.

Pecuniary
legacy to
wife for
housekeep-
ing.

Executors to
provide
mourning for
wife, &c.

Devise of

liquors (*a*), fuel and other household effects, which shall at my decease be in or about my dwelling-house at —, or belong to my establishment there. I BEQUEATH to my said wife the sum of £200, for housekeeping, to be paid by four equal instalments at the end of three, six, nine and twelve calendar months after my decease. I DIRECT my executors to provide my wife and my children, and the wives of such of my sons as shall be married, with such mourning as my executors shall in their discretion think reasonable. I DEVISE the freehold, copyhold (*b*), and

*Bona quæ
ipso usu con-
sumuntur.*

(*a*) Wines and other consumable stores should always be given to the legatee absolutely, and no attempt be made to create life or other temporary interests in property of this description, of which the enjoyment consists in their consumption. Indeed, the effect of giving a life interest in consumable articles, is to entitle the legatee absolutely (*Randall v. Russell*, 3 Mer. 194; *Andrew v. Andrew*, 1 Col. 690. See also *Twining v. Powell*, 2 Col. 262). But this does not apply to the stock in trade of a wine merchant (*Phillips v. Beal*, 32 Be. 25), or to farming stock and implements of husbandry (*Groves v. Wright*, 2 K. & J. 347); and as to wearing apparel, see *Re Hall's Will* (1 Jur., N. S. 974).

A distinction, however, is to be taken between a specific and a residuary gift for life of goods *quæ ipso usu consumuntur*: if the gift be specific, it is an absolute gift of the property, but if residuary, the things must be sold, the produce invested, and the interest thereof paid to the legatee for life. See 2 Wms. Exors. 1294; 2 Tud. L. C. Eq. 286; and 1 Jarm. Wills, 835.

Leaseholds,
copyholds,
reversions
and remain-
ders pass
under a gen-
eral devise,
when.

(*b*) As to excepting copyholds from a general devise and giving the trustees a power of sale over them in the first instance, see *ante*, pp. 118, 287. The stat. 1 Vict. c. 26, materially affects and alters the operation of a general devise. For, before that statute, when such a devise was intended to comprise leaseholds for years, it was necessary that they should be expressly mentioned, as it would not otherwise have extended to them, unless the testator, when he made his will, had no freeholds to which the devise could apply (*Rose v. Bartlett*, Cro. Car. 292; *Thompson v. Lady Lawley*, 2 B. & P. 303; *Weigall v. Brome*, 6 Sim. 99). Now, however, by such a devise, leasehold lands will pass, provided the words would have been sufficient to describe them if the testator had not possessed freehold land (unless a contrary intention appear from the will, ss. 26, 27, *ante*, pp. 48—51). And, by the last of these sections, the further operation is attributed to such a devise, of comprising and disposing of, by way of execution of a power, all lands to which the description shall extend, which the testator has power to appoint in any manner he thinks proper. See further as to leaseholds, *Wilson v. Eden* (16 Be. 153), *ante*, p. 48; *Nelson*

leasehold estates to which I shall be entitled at my decease, with their appurtenances, unto and to the use of my trustees [*names, &c., of trustees*], their heirs, executors, administrators and assigns, according to the nature thereof respectively, UPON TRUST when and as my trustees, in order to effectuate any of the purposes of my will, or with a view to the advantage of my estate, or the more convenient division thereof among the persons entitled thereto, shall in their discretion find it necessary or expedient so to do, to sell my said estates or any part thereof together or in parcels by public auction or private contract with liberty to make any special or other conditions of sale as to the title, or evidence of title or otherwise, and to buy in the premises at any sale by auction, and to rescind any contract and to resell the premises without being answerable for any loss, or to raise money by mortgaging (with or without a power of sale) in fee or for years, or by charging my said estates or any part thereof, or by all or any of those means, and to do and execute all acts and assurances requisite for effecting or facilitating any sale, mortgage or charge, pursuant to this trust. I BEQUEATH the residue of the personal estate and effects (c) of

real estates to trustees, upon trust to sell, or to raise money by mortgage, as the purposes of the will may require.

Bequest of residue of personal

v. Hopkins (21 L. J., Ch. 410); *Morrell v. Fisher* (4 Exch. 591). And as to copyholds, *Stokes v. Salomons* (9 Ha. 75).

Reversions and remainders in fee also pass under such devises without specification, unless excluded by the inapplicability of some of the limitations in the devise; but it is the inclination of the modern cases to treat this ground of exclusion with less attention than it formerly received (*Church v. Mundy*, 15 Ves. 393; *Doe v. Bartle*, 5 B. & Al. 492; *Doe v. Carpenter*, 16 Q. B. 181; *Ford v. Ford*, 6 Ha. 486. See also *Doe v. Weatherby*, 11 Ea. 322; *Doe v. Fossick*, 1 B. & Ad. 186). And on the operation of a general devise of realty, see 1 Jarm. Wills, ch. 20.

(c) It is common, in residuary clauses in wills, to find, in addition to the general words here used, a long enumeration of particulars of which the personal estate then actually did or might be supposed to consist. Of all kinds of verbosity this seems to be the most inexpedient, if not pernicious; for if these words are not absolutely nugatory (which they generally are), their effect is to restrict the more comprehensive words by which they are usually succeeded. Such particularity also sometimes gives rise to another question, namely, whether the residuary legatee is not to stand in the favoured position of a specific legatee, in regard to the enumerated articles (*vide ante*, pp. 92, 125); and such question becomes especially important where there is a deficiency of assets to pay all the debts and legacies. It ought always to be prevented by an unequivocal expression of intention,

Inexpediency of associating particular with general words of description.

Pr. XXII.

estate to
trustees,
upon trust to
convert and
get in.

every kind, to which I shall be entitled at my decease, unto the said [*trustees*], their executors, administrators and assigns, UPON TRUST to sell, convert into money, get in and receive so much thereof as shall not consist of ready money, or of such investments in stocks, funds or securities (whether of the description contemplated by the trust for investment hereinafter contained or not) as my trustees shall think it desirable to continue. AND I DIRECT my trustees to receive the money to arise from my said residuary personal estate, and stand possessed thereof, together with the stocks, funds and securities to be continued as last aforesaid, upon the trusts hereinafter declared concerning the same. AND, as to the moneys to arise from the execution of the trusts hereinbefore contained concerning my real estates and residuary personal estate, and not presently applicable to the purposes of my will, I DIRECT my trustees to invest the same, in their names, in or upon any one or more of the investments or securities following, and those only, that is to say, the public stocks, funds or securities of the United Kingdom, real (*d*) or leasehold securities in England or Wales, such lease-

Trustees to
invest the
produce of
real and per-
sonal estate;

where the residuary legatee is to take any of the personal property in the character of a specific legatee; and by framing the residuary bequest in the ordinary general and comprehensive language, where he is not.

Investment
on real secu-
rities.

(*d*) In *Robinson v. Robinson* (11 Be. 371), Lord Langdale, M. R., held that where a testator empowered his trustees to invest his residuary estate "on real securities," they were not justified in allowing part of it to continue invested in London Dock Stock, or in Turnpike Road Bonds or Sewer Bonds. The Lord Justices, however, held (1 D. M. & G. 261), that the Turnpike Road Bonds, being in fact mortgages on the toll-houses, were real securities, on which the trustees were justified in leaving testator's assets invested: but their Lordships refrained from giving any opinion on the point whether they would have been justified in laying out any part of the general assets on Turnpike Securities similar to those in question. The case, therefore, is an authority only to this extent, that the Lords Justices did not consider the trustees guilty of a breach of trust by allowing the investment to remain as they found it. See also *Holgate v. Jennings* (24 Be. 623). In *Mortimore v. Mortimore* (4 De G. & J. 472), where trustees were directed to invest "upon the security by way of mortgage of any freehold, copyhold or leasehold hereditaments," the Lord Chancellor and Lords Justices held that investments on railway mortgages (made in conformity with the Companies Clauses Consolidation Act, 1845, sect. 38), and on Great Northern Debenture Stock (which, by G. N. R. Increase of Capital Act, 1853, sect. 19, is a charge on the tolls and lands of the com-

Turnpike
road bonds.

Railway
mortgages,
debenture
stock.

holds having not less than sixty years unexpired at the times of the advances thereon respectively, and the bonds, debentures or debenture stock or guaranteed stock of any public company authorized by Act of Parliament and at the time of the investments respectively paying a dividend on their ordinary shares (e); AND I AUTHORIZE them to vary and transpose, at their discretion, as well the stocks, funds and securities whereon such investment shall be made, as any stocks, funds or securities which shall at my decease compose part of my personal estate, for any other stocks, funds or securities of the description contemplated by the preceding direction. I DECLARE that all the trust moneys, stocks, funds and securities aforesaid shall form an aggregate fund, and be held upon the trusts following; (namely), UPON TRUST in the first place, out of the annual produce thereof, to raise an annuity of £—, and pay the same to my said wife during her life, if she shall continue my widow, she maintaining, educating and bringing up, to the satisfaction of my trustees, my son or sons for the time being under the age of twenty-one years, and my daughter or daughters for the time being under that age not having been married; But if she shall fail so to do, I authorize my trustees, in their discretion, to retain and appropriate for that purpose so much of the said annuity as they shall think expedient, and to pay the residue to my said wife for her own support and maintenance. But if my said wife shall marry again, then UPON TRUST to raise and pay to her an annuity of £— only during the remainder of her life, for her separate use, independently of any and every husband

—power to vary investment, extending to moneys invested at testator's death.

Trusts of the aggregate fund arising from the real and personal estate;

—to pay annuity to wife during widowhood, she maintaining, &c. the children;

—if she neglect, trustees may apply part of the annuity for that purpose;

—to pay to wife marrying again a reduced annuity, for her separate use;

pany) were not sanctioned by the trusts of the will: Sir *J. L. Knight Bruce*, however, intimated his opinion that if the trustees had found any of testator's property invested at his death in such railway mortgages or debentures, the Court would not have considered them guilty of error so clear and manifest, in continuing such an investment, as to visit them with the consequences of a breach of trust. And a power to invest "upon the security of the funds of any company incorporated by Act of Parliament" does not warrant an investment in preference shares in a railway (*Harris v. Harris*, 29 Be. 107).

(e) The policy of allowing this wide discretion as to investments is exceedingly doubtful. It is, however, now frequently given. But, generally, the discretion is limited to the debentures of the principal railway companies.

Pr. XXII.

—to apply, after the death or marriage of wife, certain allowances for maintenance of children, according to a scale of ages;

—annuities and maintenance to be paid quarterly;

—to accumulate the sur-

with whom she may intermarry, and without power of anticipation (*f*). AND, after the decease or marriage of my said wife to raise and apply, in or towards the maintenance, education and bringing up of each son of mine who shall be under the age of twenty-one years, and each daughter of mine who shall be under that age not having been married, the yearly sum of £ — till the age of — years, the yearly sum of £ — from the age of — to — years, and thenceforth the yearly sum £ —, in such manner as my trustees shall in their discretion think fit. AND I DIRECT the said annuity of £ — to be paid quarterly, clear of all deductions, with a proportional part thereof down to the decease or marriage of my said wife, and the first portion to become payable at the end of three calendar months next after my decease, and the first payment of the said annuity of £ —, and of the said yearly sum for maintenance, to be made at the end of three calendar months next after the marriage or decease of my said wife. AND I FURTHER DIRECT that so long as any child of mine shall be living and under the age of twenty-one years, my trustees shall raise and pay quarterly to each daughter of mine who shall have attained the age of twenty-one years and shall not have been married, the clear yearly sum of £ —, with a proportionate part down to the cessation of such payment. AND UPON FURTHER TRUST (*g*) to

Inalienable trust for married women.

(*f*) The wife might avoid this restriction by assigning the annuity while discover (*ante*, pp. 200, 265); to prevent which, however, it might, in the event of her doing so, be made to cease by a clause to the following effect:—

AND I DECLARE that in case my said wife, while discover, shall do or suffer any act or thing whereby the said annuity, or any part thereof, shall be assigned, charged or incumbered, the same annuity shall wholly cease.

Some forms in common use provide for cesser in case the woman during discoverure “shall attempt to alien or incumber.” As to a proviso of forfeiture in case of doing or “attempting” to do a certain act, see *Wade v. Hopkinson* (19 Be. 613). See also *Graham v. Lee* (23 Be. 388); *Jones v. Wyse* (2 Ke. 285).

Accumulation of income, how far restrained.

(*g*) The prospective accumulation of income is restrained by 39 & 40 Geo. 3, c. 98, (usually called the *Thellusson* Act, in reference to the gentleman whose extraordinary will supplied occasion for it). The statute enacts, “that no person or persons shall, by any deed or deeds, surrender

invest in the names of my trustees the surplus which, after satisfying the said annuities, and all expenses incident to the

plus income
for twenty-
one years

or surrenders, will, codicil, or otherwise soever, settle or dispose of any real or personal property, so and in such manner that the rents, issues, profits, or produce thereof shall be wholly or partially accumulated for any longer term than the life or lives of any such grantor or grantors, settlor or settlors; or the term of twenty-one years from the death of any such grantor, settlor, devisor, or testator; or during the minority or respective minorities of any person or persons who shall be living or in *ventre sa mère* at the time of the death of the grantor, devisor, or testator; or during the minority or respective minorities only of any person or persons who, under the uses or trusts of the deed, surrender, will, or other assurances directing such accumulations, would for the time being, if of full age, be entitled unto the rents, issues and profits, or the interest, dividends or annual produce so directed to be accumulated; and in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits and produce of such property so directed to be accumulated shall, so long as the same shall be directed to be accumulated contrary to the provisions of this Act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed." By sect. 2, the Act is not to extend "to any provision for payment of debts of any grantor, settlor, or devisor, or other person or persons, or to any provision for raising portions for any child or children of any grantor, settlor, or devisor, or any child or children of any person taking any interest under any such conveyance, settlement or devise, or to any direction touching the produce of timber or wood, upon any lands or tenement." By sect. 3, the Act is not to extend to "any disposition respecting heritable property in Scotland."

Thellusson
Act, 39 & 40
Geo. 3, c. 98.

Exception.

If the allowed term is exceeded, the accumulation is nevertheless good *pro tanto* (*Griffiths v. Vere*, 9 Ves. 127; *Longdon v. Simson*, 12 Ves. 295; *Re Lady Rosslyn's Trust*, 16 Sim. 391); but a trust for accumulation which was bad before the statute is of course still so (*Boughton v. James*, 1 Col. 45; *Boughton v. Boughton*, 1 H. L. C. 406; *Browne v. Stoughton*, 14 Sim. 369; *Scarisbrick v. Skelmersdale*, 17 Sim. 187).

Trusts for
accumula-
tion.

Implied, no less than express trusts, are within the statute. Thus, by way of illustrating both these positions, suppose a testator to give his real and personal estate to such of the children of A. as shall attain the age of twenty-one years:—This would create an implied accumulating trust until the vesting of the gift, which, if A. had no child at the testator's decease, would exceed the allowed limit; and the effect would be, that for twenty-one years from the testator's death the accumulation would proceed under the authority of the statute: and from that period until the vesting, the income of the realty would go to the testator's heir as real estate undisposed of, and the income of the personalty to the next of kin as personal estate undisposed of. And where a testator creates a charge which has the effect

Implied
trusts.

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from testa-
tor's death,
if any child

execution of the trusts hereby created, shall from time to time remain in their hands of the yearly produce of the said fund, in

Trusts for
accumula-
tion.

of carrying an accumulation for a period exceeding the statutory limit, it will be *pro tanto* void, though the testator has not in terms directed that the income shall accumulate (*Shaw v. Rhodes*, 1 M. & C. 135; *Evans v. Hellier*, 5 C. & F. 114; *Tench v. Cheese*, 6 D. M. & G. 453; *Morgan v. Morgan*, 4 De G. & S. 164. See also 4 Dav. Conv. by Waley, 253). But where, subject to a direction to accumulate, real estate is devised to several in succession, the direction to accumulate operates as a charge on the successive estates, and accumulations made after twenty-one years from the testator's death belong, not to his heir-at-law, but from time to time to the several persons entitled to the rents and profits (*Re Clulow's Trust*, 1 J. & H. 639).

A trust for accumulation, however short, will be void, unless it falls within twenty-one years from the testator's decease, or constitutes one of the alternative purposes or periods of accumulation allowed by the statute. For instance, if a testator should give his real and personal estate to A. for life, and then to such of the children of B. as during the life of A. or afterwards should attain the age of twenty-one years, accumulation would not be allowed for twenty-one years from the decease of A., but only for so much, if any, of the term of twenty-one years, computed from the testator's decease, as should happen to be unexpired at A.'s decease (*Attorney-General v. Poulden*, 3 Ha. 555). It will be observed that the Act authorizes accumulation during any of the four periods: and only for one of those periods (*Wilson v. Wilson*, 1 Sim., N. S. 288). The last-mentioned of the alternative periods is the minority of any person, who, under the uses or trusts, would, if of full age, be entitled to the rents, &c.; which clause has been decided not to extend to a trust for accumulating income during the minority of an unborn person, to whom, at majority, the original fund and the accumulations are given (*Haley v. Bannister*, 4 Mad. 275). See also *Ellis v. Maxwell*, 3 Be. 596; *Bryan v. Collins*, 16 Be. 17; and the remarks on those cases in 1 Jarm. Wills, 284.

Destination
of income re-
leased from
accumula-
tion.

Questions frequently arise respecting the destination of the income which the statute releases from accumulation, as to which the cases seem to establish the following distinction:—That where the property is, in the first instance, actually disposed of in terms which would, if the testator had stopped there, have entitled the devisee or legatee to the immediate income, and the testator then proceeds to engraft on such disposition an accumulating trust, which wholly or partially fails on account of its taking too wide a range; the statute, by discharging the property from the superadded trust, has the effect of entitling the devisee or legatee to the immediate income, in the same manner as if the prior gift had stood alone (*Trickey v. Trickey*, 3 M. & K. 560; *Combe v. Hughes*, 2 D. J. & S. 657; and compare *Re Clulow's Trust*, *suprà*). Where, on the other hand, the gift in question is ulterior to, and is made to take effect on, the expiration

or upon such stocks, funds or securities (and those only) as are specified in the direction for investment hereinbefore contained, shall continue under age.

of the accumulating trust, the result is different, the gift being then considered not as intended to take effect in possession on the determination by any means of such trust, but as involving an absolute postponement of possession until its expected determination (for the testator of course supposes the trust for accumulation to be valid): and in such case, the Act, while it wholly or partially disappoints the testator's purpose, so far as respects the intermediate destination of the income, does not, by accelerating the ulterior gift, unnecessarily interfere with his testamentary scheme, but leaves such gift to take effect in the same manner as if the accumulation had been valid (*Crawley v. Crawley*, 7 Sim. 427; *O'Neill v. Lucas*, 2 Ke. 313; *McDonald v. Bryce*, Id. 276; *Eyre v. Marsden*, 4 M. & C. 231; *Green v. Gascoyne*, 5 N. R. 227). On the question whether accumulations, not expressly directed by the will, but arising by operation of law, are within the Act, see *Mathews v. Keble* (L. R., 4 Eq. 467; 3 Ch. 691). In *Barrett v. Buck* (12 Jur. 771), it was held, that the excess of accumulations arising from the annual produce of the fund, after the period allowed by the Thellusson Act, belonged to the heir-at-law of the testator, and that he took it as personal, and not as real estate. See also *Sewell v. Denny*, 10 Be. 315; *Halford v. Stains*, 16 Sim. 488; *Smith v. Lomas*, 4 N. R. 318. As to the costs of a suit for ascertaining the destination of a fund released from accumulation, see *Oddie v. Brown*, 4 De G. & J. 198; *Green v. Gascoyne* and *Combe v. Hughes*, *ubi sup.*

As before intimated, of a trust for accumulation which before the Thellusson Act would have been good, "so much as is now within the Act will be good, but the excess will be bad; but if there be a trust for accumulation, and part of it would have been bad before the Act, that part remains bad notwithstanding the Act" (*per* Lord Eldon, in *Marshall v. Holloway*, 2 Sw. 450). The period for the distribution of accumulations is not accelerated by the operation of the Act in shortening the time during which such accumulations are to be made (*Nettleton v. Stephenson*, 3 De G. & S. 366).

As to the exceptional cases in which accumulations are permitted: (1) for the payment of debts. The doctrine of Sir G. J. Turner, V.-C., in *Lord Barrington v. Liddell* (10 Ha. 429), that the debts provided for must be the debts of the testator himself, was overruled by Lord St. Leonards (2 D. M. & G. 480). Accumulation for payment of debts and legacies for a period of thirty years has been held allowable, the legacies being to persons in existence (*Williams v. Lewis*, 6 H. L. C. 1013). See also, as to provisions for the payment of debts, *Bateman v. Hotchkin* (10 Be. 426); *Varlo v. Faden* (1 D. F. & J. 211). (2) As to the exception in favour of portions, see *Bourne v. Buckton* (2 Sim., N. S. 91); *Jones v. Maggs* (9 Ha. 605); *Burt v. Sturt* (10 Ha. 415); *Middleton v. Losh* (1 S. & G. 61); *Wildes v. Davies* (Id. 475); *Edwards v. Tuck* (3 D. M. & G. 40); *Beech*

Trusts for accumulation.

Accumulations allowed; for payment of debts,

and for raising portions for children.

Pr. XXII.

Trusts of the
accumulated
fund ;

—for chil-
dren and
issue living
at the
cessation
of trust for
accumula-
tion, *per
stirpes*, with
benefit of
accruer be-
tween the
issue, so
regulated as
to keep the
stocks equal ;

Trusts for
accumula-
tion.

with the same power of transposition as accompanies such direc-
tion, and by similar investments to accumulate at compound
interest the income of the said aggregate fund, for the term of
twenty-one years from my death, if any child of mine shall so
long live and be under the age of twenty-one years. I DIRECT
my trustees, on the determination of the said term of twenty-
one years determinable as aforesaid (which determination is
hereinafter referred to as the period of distribution), to stand
possessed of the said aggregate fund, with the accumulations
thereof, but subject to such of the principal trusts hereinbefore
contained anterior to the trust for accumulation as shall be then
subsisting, IN TRUST for my child or children living at the
period of distribution, and the issue then living of my child or
children dying before that period, such objects to take as ten-
ants in common according to the stocks and not to the number
of individuals composing the class ; the shares of children to be
paid immediately, and the shares of other issue, being males,
at the age of twenty-one years, or, being females, at that age or
marriage. AND I DIRECT that the shares, original and accruing,
of male issue dying under that age, and female issue dying

v. Lord St. Vincent (3 De G. & S. 678 ; 5 W. R. 769) ; *Drewett v. Pollard* (27 Be. 196) ; *Heywood v. Heywood* (29 Be. 9) ; *Watt v. Wood* (2 Dr. & S. 56).

As to the exception of heritable property in Scotland, see *Macpherson v. Stewart* (7 W. R. 34).

The Act is not applicable to real estate in Ireland, or to the rents thereof, but it is applicable to the income arising from accumulations of such rents : see *Ellis v. Maxwell* (12 Be. 104).

A direction by will to pay the premiums on a life-insurance policy is valid for the whole life insured, and is not an accumulation restricted by the Act to twenty-one years (*Bassil v. Lister*, 9 Ha. 177).

See further, on the subject of accumulations and the Thellusson Act, the notes to *Griffiths v. Vere*, in Tud. L. C. R. P. 430—455 ; 1 Jarm. Wills, 282, *et seq.* From the numerous cases cited it will at once be manifest that this statute, intended to counteract the effects of “posthumous avarice,” has been productive of much litigation, arising principally from the ambiguous or ill-chosen language employed in the Act itself—an Act of which it has been said by Lord Brougham (see 1 M. & C. 141), that it “has hardly ever been discussed in courts either of law or equity, without the Judge having occasion to observe upon the inartificial, and in several respects ill-defined, language in which its provisions are expressed.”

under that age without having been married, shall accrue to the other, or to and among the others, of the objects of the trust lastly hereinbefore contained, in manner prescribed by such trust, except that the other issue of the parent from whom the issue so dying proceeded shall be preferably entitled to the benefit of such accruer, so as to maintain equality of distribution among the stocks; BUT if there shall not be any object of the same trust, or not any such object who shall become entitled to an absolutely vested interest, then, as to the said trust fund, UPON TRUST to divide the same equally between my brothers and sisters [*names*], who shall be deemed to have vested interests in their respective shares on my decease. PROVIDED ALWAYS that it shall be lawful for my trustees, at any time or times before the period of distribution, to apply out of the said trust fund any sum or sums of money, not exceeding in the whole £—, in or towards the establishment of each or any son of mine in any profession, trade or business to be approved of by my trustees, or his advancement in the world in any other manner which may appear to them expedient; And also to advance to each daughter of mine who shall be married, with their previous approbation in writing, the sum of £— on such her marriage (*h*). AND I DECLARE that the sums to be advanced

—If no object of the preceding trust, then for testator's brothers and sisters equally.

Power to apply a limited sum for the advancement of each child of testator.

(*h*) By the civil law, conditions restraining marriage were absolutely void, and marriage generally was a sufficient compliance with a condition requiring marriage with consent, or with a designated individual, or under certain other prescribed circumstances (Godolph. p. 3, c. 17). Our law has not evinced the same impatience of nuptial restrictions; for it is clear, that a condition is legal which inhibits marriage until majority or any other reasonable age, or which requires consent, or restrains marriage with any particular individual, or even with a very large class, for instance, a native of Scotland (*Perrin v. Lyon*, 9 Ea. 170), or a Papist (*Duggan v. Kelly*, 10 Ir. Eq. Rep. 295).

As to conditions restraining marriage.

Where a man made a settlement upon a woman with whom he lived, by which he covenanted to pay her 40*l.* a year during her life, with a proviso, that if she should at any time thereafter marry any person whomsoever, then the annuity should be reduced to the yearly sum of 20*l.*, Sir *L. Shadwell*, V.-C. E., held, that the clause reducing the annuity was void, as a restraint on marriage (*Grace v. Webb*, 15 Sim. 384). But this decision was over-ruled by Lord *Cottenham* (*Webb v. Grace*, 2 Ph. 701), on the ground that the case fell within the principle about to be stated.

to my said sons and daughters as aforesaid shall be taken in part satisfaction of the shares to which they or their issue may

Gift until marriage, valid.

It is clear that the law of England does not prohibit the gift of an annuity or other interest in the income of property, real or personal, until marriage; for though a benefit or interest once given cannot be divested or taken away upon marriage, it seems impossible to maintain that a trust or gift, which in its original creation embraced only the period of discovery, can be held to confer on the cestui que trust or legatee a title, when she has by marriage ceased to answer the description which the testator has annexed to his gift. In such a case, to hold the legatee to be entitled after marriage, would be not merely to vacate a condition which the testator has engrafted on the original gift, but to extend and enlarge the original gift itself beyond the limits prescribed by its author. (See *Andrew v. Andrew*, 1 Col. 690; *Morley v. Rennoldson*, 2 Ha. 570; *Lloyd v. Lloyd*, 2 Sim., N. S. 255; *Heath v. Lewis*, 3 D. M. & G. 954; *Potter v. Richards*, 3 W. R. 266; *Tricker v. Kingsbury*, 7 W. R. 652.)

Efficacy of a gift over in rendering condition to ask consent effective.

The law of England, however, has admitted the principle of the civil law to this extent, that it treats as nugatory a condition, attached to a gift of personalty, to ask consent, unless accompanied by a bequest over in default (*Bellasis v. Ermine*, 1 Ch. Cas. 22; *Aston v. Aston*, 2 Ver. 452; *Semphill v. Bayley*, Pre. Ch. 562; *Wheeler v. Bingham*, 3 Atk. 364; *Clarke v. Parker*, 19 Ves. 13). And a residuary bequest is not considered such a bequest over (*Semphill v. Bayley*, Pre. Ch. 562; *Paget v. Haywood*, cit. 1 Atk. 378; *Scott v. Tyler*, 2 Br. C. 431); unless there be an express direction that the forfeited legacy shall fall into the residue (*Wheeler v. Bingham*, 3 Atk. 362; *Lloyd v. Branton*, 3 Mer. 108). The doctrine applies to conditions both precedent and subsequent; or, in other words, it applies as well where the marrying with consent is to precede the vesting, as where the marrying without consent is made to divest a legacy antecedently vested. Hence a bequest to a lady, if or in case she shall marry with the consent of A., would entitle her to the legacy on marriage though without consent, but not without marriage at all; for it is to be observed, that the doctrine in question dispenses with the consent only, and not with the marriage; so that a legatee unmarried cannot claim any benefit to which the testator has annexed the condition of marrying with consent (*Garbut v. Hilton*, 1 Atk. 311). The doctrine admits, however, of the three following material exceptions:—1st. Where the legatee takes an alternative legacy, *i. e.* a legacy in the event of not marrying with consent (*Creagh v. Wilson*, 2 Ver. 572; *Gillet v. Wray*, 1 P. W. 284; *Reynish v. Martin*, 3 Atk. 330). 2ndly. Where marriage with consent is only one of several events, on the happening of which the legatee will be entitled to the legacy in question; as where it is given on the attainment of a particular age or marriage with consent, which shall first happen (*Hemmings v. Munckley*, 1 Br. C. 304; 1 Cox, 38); or on attaining a particular age unmarried, or marrying with consent before such age (*Scott v. Tyler*, 2 Br.

Instances of condition requiring consent to marriage being valid without a bequest over.

respectively become entitled of the said trust fund: PROVIDED ALSO that it shall be lawful for my trustees to apply, in or

Power to apply income

C. 431). In the former of the cited cases, a legatee dying before the specified age, without having been married, and, in the latter, a legatee marrying before such age, without consent, was held not to be entitled. And where a legacy was given to A. to be paid at twenty-one, in case she attained that age, or upon her marriage, provided she married with the consent of the executors, and not otherwise; the legatee, marrying without consent under twenty-one, was held not to be entitled to claim payment of the legacy during minority, though the required consent had become impossible by the act of God, the only executor who had proved the will being dead (*Knight v. Cameron*, 14 Ves. 389). The 3rd and last instance of exception to the rule, that marriage conditions requiring consent are *in terrorem* only, is where they are confined to marriage during minority (*Stackpole v. Beaumont*, 3 Ves. 89), or other reasonable age; see *Yonge v. Furze* (3 Jur., N. S. 603), where a condition in restraint of marriage before twenty-eight was held valid. In these several excepted instances the legatee must strictly comply with the condition which the testator has annexed to his bounty, even though there be no bequest over in default.

Marriage conditions.

It is satisfactory to find that the numerous and refined distinctions respecting marriage conditions, and the efficacy of a gift over on non-compliance with the conditions, which have obtained in regard to personal legacies, have not been applied to devises of real estate, including under this denomination pecuniary charges on land. Real estate is governed by the rules of the common law, and, never having been subject to the jurisdiction of the Ecclesiastical Courts, is not influenced by the rules of the civil law. A condition prohibiting marriage generally is (except in the case of a widow, *Newton v. Marsden*, 2 J. & H. 356; as to a widower, see *Evans v. Rosser*, 2 H. & M. 190) void as being against public policy, whether the gift to which it is attached be of realty or personalty (*Perrin v. Lyon*, 9 Ea. 183; *Morley v. Rennoldson*, 2 Ha. 570). But a devise on condition of marrying with consent—such restraint of marriage being particular, a partial and reasonable restraint, and the condition being precedent—will not take effect unless the condition be strictly complied with, whether there be a devise over or no (*Pawlet v. Pawlet*, 1 Ver. 204; 2 Ven. 397; *Bertie v. Lord Falkland*, 3 Ch. Cas. 129; 2 Ver. 333; *Pulling v. Reddy*, 1 Wils. 21; *Hervey v. Aston*, 1 Atk. 361; *Reynish v. Martin*, 3 Atk. 330); and if marriage with consent be a condition subsequent, a breach of the condition will divest the estate (*Fry v. Porter*, 1 Ch. Cas. 138), unless the condition become impossible to be performed, in which case the estate becomes absolute. It may happen that a sum of money payable out of land on marriage with consent, in aid of the personal estate, may at one and the same time fail as a charge on the realty, and yet be payable as a personal legacy. Such an instance occurs in the case of *Reynish v. Martin* (3 Atk. 330), where a testatrix willed that if her daughter Mary married with the

Marriage conditions in reference to real estate.

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of shares of
grand-child-

towards the maintenance and education, or otherwise for the benefit of each grandchild, or more remote issue, all or any

Marriage
conditions.

consent of her trustees, then, and not otherwise, she gave her 800*l.*; and the legatee was also to receive 30*l.* yearly while sole and unmarried; the testatrix charged her real estate with legacies; Mary married without consent; and Lord *Hardwicke* held that the 800*l.* was payable as a legacy of personal estate, but not as a charge upon the realty.

Effect of cir-
cumstances
occurring in
the testator's
lifetime.

A change of circumstances in the lifetime of the testator sometimes has a material effect upon conditions restraining marriage. Thus, if a parent gives a legacy to his daughters, provided they marry with the consent of his trustees, this proviso would be held not to apply to a daughter who had subsequently married in his lifetime, with his own consent (*Clarke v. Berkeley*, 2 Ver. 720; *Parnell v. Lyon*, 1 V. & B. 479); even though the testator's approbation was posterior to the marriage (*Wheeler v. Warner*, 1 S. & S. 304); or though the daughter was a widow at his death (*Crommelin v. Crommelin*, 3 Ves. 227). See also *Smith v. Cowdery* (2 S. & S. 358); *Davis v. Angel* (31 Be. 223).

A legacy to a person so long as she shall remain unmarried has been held not to belong to a person, who, subsequently to the will, married in the testator's lifetime (*Andrew v. Andrew*, 1 Col. 690); see also *Yonge v. Furze* (3 Jur., N. S. 603). But if the legatee was married at the date of the will, though that fact was unknown to the testator, she is absolutely entitled (*Rishton v. Cobb*, 5 M. & C. 145). A bequest to a daughter "for her life or until her marriage, and after her decease or marriage, which shall first happen," upon trusts for the benefit of her children by two husbands, both then deceased—the daughter having afterwards, in testator's lifetime, married a third husband—was held by Vice-Chancellor *Wood* (as there was nothing to show that the testator, who was aware of the third marriage, had not purposely left his will to operate upon the state of circumstances existing at his death), to entitle the daughter to the income during her life or until a fourth marriage (*Bullock v. Bennett*, 1 K. & J. 315); but this decision was reversed by the Lords Justices (7 D. M. & G. 283), who held that the 24th sect. of the Wills Act applies, not to the objects of testator's bounty, but *only* to the property comprised in the will. See *ante*, p. 43.

A testator gave an annuity to his daughter for the life of his wife, but in case the daughter should cohabit with her husband, the same to cease so long as she should so cohabit; he also gave one-third of the interest of certain personalty to her during such time as she should live apart from her husband, but if she should at any time cohabit with him, testator divided the same one-third between two other persons: at the date of the will the daughter was living apart from, but before the death of the testator she cohabited with, her husband, and continued to do so down to the testator's death. It was held by *Knight Bruce*, V.-C., that the daughter was entitled to the annuity and one-third discharged of the condition

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part of the yearly income of his or her share, during the minority of a male, and the minority and discoveriture of a female, the unapplied income to be accumulated, and the accumulations added to the share whence such income shall have arisen; And also to apply, in or towards the advancement in the world of each male grandchild or more remote issue, any part not exceeding one-half of the principal of his share. PROVIDED ALSO that, notwithstanding any thing hereinbefore contained, it shall be lawful for my trustees, at any time or times until the period of distribution, in their discretion, to invest any part of the said trust fund, or the accumulations thereof, in the purchase of any estates in the county of —, of freehold or copyhold tenure, or held for a term or terms of years of which [fifty] years at least shall be unexpired, or in taking any ground or buildings in the same county, on building, repairing or improving leases, in consideration of such fines or premiums, at such rents, and subject to such conditions as to my trustees shall seem expedient; and the property to be so purchased and taken shall be vested in my trustees, and be subject to the same trusts and provisions as my real estates hereinbefore devised. PROVIDED ALSO that it shall be lawful for my trustees at any time or times until the period of distribution, in their discretion, to prosecute or complete any buildings, repairs or improvements, which shall at my decease have been begun, contracted for, or projected by me, in or upon any part or parts of my devised estates, and to

dren and more remote issue, for their maintenance, and half the capital for their advancement.

Power to purchase real estate, and take land on building leases.

Power to carry on building operations.

(*Wren v. Bradley*, 2 De G. & S. 49; and see *Brown v. Peck*, 1 Ed. 140; *Bean v. Griffiths*, 1 Jur., N. S. 1045). Marriage conditions.

Enough has been stated to show the necessity of care and explicitness in preparing marriage conditions, and that, to render conditions requiring consent effectual, where annexed to bequests of personal property, they should be accompanied (unless in the excepted cases before noticed) with an express bequest over in the event of marriage without consent. Indeed, considering the litigation to which conditions requiring consent have given rise (for the present note embraces only a small portion of the questions that have been raised concerning them), and the nature of the duty which they impose upon, and of the power which they place in the hands of, trustees, it seems in general the more prudent course not to encourage testators in the imposition of such restraints.

Scott v. Tyler is the leading case on the validity or invalidity of conditions in restraint of marriage annexed to a gift. See that case, and the notes thereto, in 2 Tud. L. C. Eq. 125—218. See also 2 Jarm. Wills, 38.

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Power to let
houses as
lodging-
houses and
purchase
furniture, &c.

Power to
grant leases.

Unsold real
estate to be
transmissible
as personal
estate.

Power to
allot real
estate, as
such, to per-
sons entitled

plan and execute any new or other buildings, repairs or improvements, in or upon any part or parts, either of my devised estates or of the estates to be so purchased or taken as aforesaid, and for those purposes to expend any part of the said trust fund and accumulations, and to use and employ any materials which I shall possess or have contracted for at my decease, and to pull down and remove any buildings erected or to be erected upon any part of my devised estates, or the estates to be so purchased or taken as aforesaid, and either to use or sell the materials thereof. PROVIDED ALSO that it shall be lawful for my trustees, at any time or times until the period of distribution, in their discretion, to let as lodging-houses any messuages erected or to be erected as aforesaid, which shall have been let by me as lodging-houses, or shall be adapted for that purpose, upon such terms and in such manner as lettings of that nature are usually conducted in or near — aforesaid; And to invest any part of the said fund or accumulations in the purchase of furniture or other articles to be used in such lodging-houses, and also to use therein the furniture and articles which shall at my decease belong to any messuages then let or intended to be let as lodging-houses. PROVIDED ALSO that it shall be lawful for my trustees, in their discretion, at any time or times until the period of distribution, to lease my said devised estates and the estates to be purchased and taken as aforesaid, or any part or parts thereof, from year to year, or for any term not exceeding [*fourteen*] years in possession from the making of the lease, so as in every such lease there shall be reserved the most improved yearly rent, without taking any premium. PROVIDED ALSO that in the meantime, until the sale of my devised estates, and of the estates to be purchased and taken as aforesaid, the same shall, for all the purposes of the trusts hereinbefore contained, be considered as money or personal estate, and be transmissible accordingly, and the rents and profits thereof be received by my trustees, and be applicable to the same purposes and in the same manner as the yearly produce of the fund to arise from the sale thereof would be applicable by virtue of my will, if such sale had actually taken place. PROVIDED ALSO that if, at the period of distribution, any real estates shall be vested in my trustees, then, notwithstanding the trust for sale hereinbefore contained, it shall be lawful for them

in their discretion, to allot the same, or any part or parts thereof as real estate, to any object or objects of the trusts hereinbefore contained in favour of my children and issue, in full or in part satisfaction of the share or respective shares of such object or objects under the same trusts, according to the value of the real estate to be so allotted, such value to be ascertained by two surveyors to be appointed by my trustees; or, if such surveyors shall not agree thereon in writing within — days after their appointment, then by a third surveyor, to be named by them as their umpire before commencing the valuation: And for the convenience or equality of any such allotment or allotments to accept and make any mortgages or charges upon the allotted estates and my residuary real and personal estates respectively, or any or either of them respectively: And the real estate to be so allotted shall be subject to trusts corresponding as nearly as may be with the trusts hereinbefore contained concerning the share or respective shares in respect of which the allotment shall be made (i). PROVIDED ALSO that my trustees shall,

—
to shares of
the trust
fund.

(i) As to discretionary powers of making settlements vested in trustees, see *Lancashire v. Lancashire* (2 Ph. 657); *White v. Briggs* (2 Ph. 583). In cases of executory trusts, the Courts of Equity mould the trusts in accordance with the intention of the creator of the trusts, which intention, in the case of executory trusts in wills, must be gathered from the words of the will alone. Where the trusts and limitations of land to be purchased by the trustees are expressly declared by the testator, the Court has no authority to make them different from what they would be at law (*Austen v. Taylor*, 1 Ed. 361; *Fullerton v. Martin*, 1 Dr. & S. 31). But if the testator has left his intention to be made out from general expressions, the Court is not bound to construe technical terms with legal strictness; for instance, it will, if there be sufficient indication of the testator's intention, hold "heirs of the body" or similar words to be words of purchase, and not of limitation (*Leonard v. Earl of Sussex*, 2 Ver. 526; *Bastard v. Proby*, 2 Cox, 6; *Rockfort v. Fitzmaurice*, 2 Dr. & War. 1; *Shelton v. Watson*, 16 Sim. 542), and will decree a strict settlement: still more readily will it do so, when the word "issue" is employed instead of "heirs of the body." In such cases, "heirs of the body" or "issue" include daughters as well as sons: thus in *Trevor v. Trevor* (13 Sim. 108, affirmed, 1 H. L. C. 239), a testator devised real estates to trustees, in trust to settle and convey them to G. R. for life, with remainder to his issue in tail male in strict settlement; in default of such issue, the estates were to go over. G. R. had no son, but had several daughters, all of whom were born after the testator's death. It was held, that the words "in tail male" were descriptive, not of the issue,

Discretionary powers of settlement.

Executory trusts in wills of realty.

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Right of pre-emption given to testator's partner as to shares of real estate belonging to the partnership.

within ——— calendar months next after my decease, cause an offer in writing to be made to my brother [*name*] of my share of the real estate belonging to us as partners in the business of ———, at ——— aforesaid, at the value set upon the same share in the stock-book of the same partnership at the last stock-taking preceding my death. PROVIDED NEVERTHELESS that if the said stock-taking shall have been taken more than twelve calendar months before my death, then my share of the said real estate belonging to the said partnership shall be offered as aforesaid to my said brother at a valuation to be made by two competent and indifferent persons as valuers, one to be chosen by my said brother and the other by my trustees, or if the said two valuers disagree, by a third valuer to be chosen by the other

Executory trusts.

Direction to entail.

Cy-près.

but of the interest they were to take, and that the daughters were entitled to take under the limitation in remainder as tenants in common in tail male. For the mode of effectuating a direction to entail real and personal estate, see *Tennent v. Tennent* (1 Dru. 161); *Jervoise v. Duke of Northumberland* (1 J. & W. 559). Where an executory trust, if carried out literally, would be void, as *e. g.* for infringing on the rule against perpetuities, the Court will execute the trust *cy-près*, and direct a settlement as strict as the law allows (*Humberston v. Humberston*, 1 P. W. 332).

Insertion of "usual powers."

Where a settlement is directed with the usual or proper powers, the Court will order the insertion of such powers as are necessary for the general management of the estate and contribute to the better enjoyment thereof, and are advantageous to all parties interested: thus powers to lease for 21 years; to grant building or mining leases, powers of sale and exchange and partition, where applicable to the circumstances of the case, and to appoint new trustees, will be inserted (see *Hill v. Hill*, 6 Sim. 144); but powers conferring personal advantages on particular parties, such as a power to jointure a future wife (*Duke of Bedford v. Marquis of Abercorn*, 1 M. & C. 312), or to raise portions (*Higginson v. Barneby*, 2 S. & S. 518), will not be inserted; and life estates will not be without impeachment of waste (*Davenport v. Davenport*, 1 H. & M. 775). As to the insertion of powers where no direction to that effect is given, see *Wheate v. Hall* (17 Ves. 85); *Brenster v. Angell* (1 J. & W. 628); *Turner v. Sargent* (17 Be. 515); *Byam v. Byam* (19 Be. 58). And as to leases and sales of settled estates, see 19 & 20 Vict. c. 120, amended by 21 & 22 Vict. c. 77, and further amended by 27 & 28 Vict. c. 45.

See also *Lyddon v. Ellison* (19 Be. 565); *Stanley v. Jackman* (23 Be. 450); *Coape v. Arnold* (4 D. M. & G. 574); *Taylor v. Austen* (1 Drew. 458). And on executory trusts, see an article from the pen of Mr. Hayes, 7 Jur., N. S., pt. 2, p. 264—266; Peachey on Settlements, p. 88; and the notes to *Lord Glenorchy v. Bosville*, in 1 Wh. & Tud. L. C. Eq. 1.

two as their umpire before they enter upon the valuation. And that, if my said brother shall, within one calendar month after such offer, signify, in writing signed by him, to my trustees his desire to accept such offer, then my trustees, on having one moiety of the value, ascertained in manner aforesaid, paid or duly allowed in account to them, and having the other moiety thereof either so paid or allowed, or otherwise, at the option of my said brother, secured by a mortgage in fee of the same share to be paid in one payment or by instalments, at any period or periods not exceeding — years from my decease, with interest after the rate of — per cent. per annum, shall, at the costs of my said brother, convey the same share to him or as he shall direct, but without prejudice to any mortgage to be made as aforesaid, but no purchaser under my will shall be obliged to take notice of this direction. PROVIDED ALSO that it shall be lawful for my trustees, in their discretion, until the period of distribution, to enter into any arrangement with [*testator's partners*], for succeeding to my share in the business carried on by them in partnership with me at — aforesaid, and for continuing such partnership business for the benefit of my estate, for such period and upon such terms as to my trustees shall seem expedient, and to employ for that purpose all or any part of the capital which shall at my decease be employed by me in the same business, or any additional capital. PROVIDED ALSO that it shall be lawful for my trustees to investigate, arrange and settle all accounts and transactions whatsoever between me and any person or persons with whom I am or shall be concerned in any partnership or partnerships, or between me and the representatives of any such person or persons, and to wind up all the affairs of such partnership or partnerships, and generally to do and execute all such acts, matters and things as shall appear to my trustees to be necessary or expedient for effecting or facilitating the final settlement of all matters arising out of any partnership concerns in which I shall be engaged at my death, or shall at any former period have been engaged. PROVIDED ALSO that it shall be lawful for my trustees, at the risk of my estate, to sell any part or parts of my personal estate embarked in trade at my decease, to any person or persons, for money or upon credit, and to accept such personal or other security, and to give such time

Power enabling trustees to succeed testator in his share of partnership business.

Power to settle partnership accounts, &c.

Power to sell stock in trade, accept personal security, and compound debts.

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Power to lend money to testator's son on bond.

Devise of mortgage and trust estates.

Power to trustees to give receipts to purchasers and others.

Power to appoint new trustees.

Copyholds, held in trust or on mortgage.

Appointment of new trustees.

for payment of the same money, or of any other money which shall be owing to me at my decease, as they in their discretion may think proper, and to compromise, compound or submit to arbitration any debt or claim affecting my estate. PROVIDED ALSO that it shall be lawful for my trustees, with the consent in writing of my said wife, during her widowhood, and after her death or marriage, in their discretion, to lend to my son [*name*], at the risk of my estate, any sum or sums of money not exceeding in the whole £—— sterling upon his bond, at interest after the rate of five per cent. per annum, for such period as my trustees shall think reasonable. I DEVISE to the said [*trustees' names*], their heirs and assigns, all the freehold hereditaments which shall, at my decease, be vested in me as trustee or mortgagee, subject to the trusts and equities affecting the same respectively. I DEVISE all the copyhold hereditaments which, at my death, shall be vested in me as trustee or mortgagee, To such uses and for such purposes as the said [*trustees' names*], or the survivors or survivor of them, shall by deed from time to time appoint; and subject thereto, to the use of the said [*trustees names*], their heirs and assigns, subject to the trusts and equities affecting the same respectively (*k*). I DIRECT AND DECLARE that purchasers and other persons who shall pay any trust moneys to my trustees, shall be exempt from all responsibility in respect of the application of the same, and from the necessity of inquiring into the regularity or propriety of any sale or mortgage purporting to be made under the trusts or powers of this my will. I EMPOWER the competent trustees or trustee for the time being of this my will to fill up the vacancies (*l*)

(*k*) Trustees frequently, but mortgagees rarely, are admitted to copyholds belonging to them in those capacities. But if either trustees or mortgagees are admitted, there appears to be no objection to the insertion in their wills of a power of appointment over their trust and mortgage estates, in order that the fines and fees referred to *ante*, p. 118, may be avoided. Such a power would, of course, be operative only upon copyholds vested in a testator, who at his death was a sole, or sole surviving, trustee or mortgagee.

(*l*) It must be carefully ascertained by the persons appointing new trustees that the vacancy has occurred under some or other of the precise circumstances contemplated by the testator in the terms of the power, or by the Act 23 & 24 Vict. c. 145. See *ante*, pp. 129—131. If a new

which from time to time shall occur in the trusteeship by the death in my lifetime or afterwards, or by the disclaimer, resig-

trustee be irregularly appointed, the old trustees can, notwithstanding such attempted appointment, exercise the powers originally given them (*Warburton v. Sandys*, 14 Sim. 622; *Miller v. Priddon*, 1 D. M. & G. 335), but if the case be not included in the terms of the power, a trustee who resigns is responsible for the consequences of his resignation. As to the liability of a person who acted as trustee, but was never regularly appointed such, see *Pearce v. Pearce* (22 Be. 248).

Irregular appointment of trustee.

A trustee who survives the testator can appoint a new trustee in the place of a trustee who predeceased the testator (*Re Hadley's Trusts*, 5 De G. & S. 67); and as to wills executed after the 28th of August, 1860, see 23 & 24 Vict. c. 145, s. 28.

Death of trustee in life of testator.

In the construction of powers of this nature, it would appear that the word "survivor" will usually be taken to denote the trustee "continuing to act" (*Sharp v. Sharp*, 2 B. & Al. 405; *Cafe v. Bent*, 5 Ha. 24), and an "acting" trustee is one who has taken upon himself to perform the trusts, and does not include one who *in limine* refuses (*Ib.*); so that where a power of appointing new trustees is given to the "acting" trustees, and all the trustees disclaim, the power of appointment is gone.

Construction of powers to appoint new trustees.

"Survivor."
"Acting."

"Refusing" or "declining" includes "disclaiming," but does not (it is submitted) refer exclusively to disclaimer; so to confine these terms, and to reject their extension to trustees who have acted, would be to exclude the application of the power to the very case which was mainly contemplated (but see *Lewin, Trusts*, 465). See also *Lancashire v. Lancashire* (2 Ph. 657, 664); *Travis v. Illingworth* (2 Dr. & S. 344).

"Refusing,"
"declining."

As to the exercise of a power by declining trustees appointing new trustees in their own places, where the power did not provide that a refusing trustee should, if willing to act, be for that purpose considered a continuing trustee, see *Stones v. Rowton* (17 Be. 308); *Nicholson v. Wright* (5 W. R. 431, 3 Jur., N. S. 313; but see 2 De G. & J. 17); *Travis v. Illingworth* (2 Dr. & S. 344). And an order cannot be made under sect. 32 of the Trustee Act, 1850, appointing a new trustee in the place of one who declines to act, unless the latter consent to the application (*Re Garty's Settlement*, 3 N. R. 636).

Bankruptcy or insolvency renders a trustee "unfit" to act (*Bainbrigge v. Blair*, 1 Be. 495; *Re Roche*, 2 Dr. & War. 287), and the Court, though it has a discretion (*Re Bridgman*, 1 Dr. & S. 164), will usually appoint a new trustee in the place of one become bankrupt (*Harris v. Harris*, 29 Be. 107); but sect. 32 of the Trustee Act does not give the Court jurisdiction to displace a trustee who desires to continue in the trust, even though he be insolvent (*Re Blanchard*, 3 D. F. & J. 131). It is apprehended that residence in any country out of the jurisdiction of the Court, within the limits of which the cestuis que trust reside, would be held to render a

"Unfit to act."

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nation, secession, incompetency or unfitness of any trustee ; And, in default of any surviving or continuing competent trustee,

trustee unfit and incompetent to act (see *Harte v. Efreneh*, 2 Dr. & War. 292).

"Going to
reside
abroad."

Under a power enabling a surviving or continuing trustee to appoint a new trustee in the place of one dying, going to reside abroad, &c., the surviving trustee, though himself permanently resident abroad, can appoint a new trustee in the place of one deceased (*O'Reilly v. Alderson*, 8 Ha. 101). Permanent residence abroad does not in such a case *ipso facto* deprive a trustee of his office; but it is a disqualification sufficient to entitle cestui que trust to have another appointed in his place (Id.) See also *Re Moravian Society* (4 Jur., N. S. 703).

"Incapable."

The term "incapable" refers to personal incapacity, as, for instance, to insanity, but not to bankruptcy (*Re Watts's Settlement*, 9 Ha. 106; *Turner v. Maule*, 15 Jur. 761), or residence abroad (*Withington v. Withington*, 16 Sim. 104; see however, *contrà*, *Mennard v. Welford*, 1 S. & G. 426).

Payment of
money into
Court.

By payment of the trust fund into Court, the trustee in effect retires from the trust, and a new trustee can be duly appointed in his stead under a power to arise in case of a trustee "refusing or declining to act" (*Re Williams's Settlement*, 4 K. & J. 87). But every power of this nature ought distinctly to specify in terms the case of a trustee retiring or being desirous to be discharged from the trusts. A trustee is not in all cases justified in paying money into Court, and if he do so without sufficient reason, and act vexatiously, he may be made liable for the costs of a petition for getting the fund out again (*Re Knight's Trusts*, 27 Be. 45; *Re Wyll's Trusts*, 28 Be. 458; *Re Foligno's Mortgage*, 32 Be. 131; see also *King v. King*, 1 De G. & J. 663); it is apprehended that this doctrine would apply to a trustee who, having no sufficient reason for retiring, sought to effect his purpose by paying money into Court, and that a trustee so acting would be saddled with the costs of appointing his successor: see also *infra*, p. 367.

Costs.

As to the
number of
trustees.

The original number of trustees must, where new trustees are substituted, be in general maintained. Thus two trustees retiring simultaneously may not appoint a single new trustee in their joint places (*Hulme v. Hulme*, 2 M. & K. 682; see however, *Corrie v. Byrom*, in Hill on Trustees, p. 610), and conversely a single retiring trustee may not appoint two new trustees to succeed him (*Ex parte Davis*, 2 Y. & C. 468, 3 M. D. & D. 304). See also on the increase or decrease of the original number of trustees, *Re Poole Bathurst's Estate* (2 S. & G. 169); *Lord Camoys v. Best* (19 Be. 414); *Nicholson v. Wright* (5 W. R. 431, as to which case, compare 2 De G. & J. 17). But of course if the instrument creating the power is so worded as to authorize a variation in the original number, effect will be given to such an intention (*Meinertzhagen v. Davis*, 1 Col. 335; see also

then this power shall be exerciseable by the proving [*or, acting*] executors or executor for the time being, or the administrators

Emmet v. Clark, 3 Gif. 32; *Reid v. Reid*, 30 Be. 388): and it may be remarked that, where the Court itself appoints new trustees, it does not always adhere to the original number (*Birch v. Cropper*, 2 De G. & S. 255; *Plenty v. West*, 16 Be. 356).

But though the original number of trustees should in general be maintained, the survivorship of the trust is not defeated because the will contains a power for preserving the original number of trustees by new appointments; unless, indeed, there be some special manifestation of such an intention. The terms of the power may unquestionably make it imperative on the donees thereof to appoint a new trustee on every vacancy, or whenever the trustees are reduced to a certain number. The clauses in common use seldom imperatively require the donees to exercise the power on every vacancy, but the surviving or continuing trustees may act notwithstanding the diminution of their number. Even where the terms of the power were such that the survivors should and were thereby required (*Doe v. Godwin*, 1 D. & Ry. 259), or where directed when the number was reduced to three to choose others (*Attorney-General v. Floyer*, 2 Ver. 748), those words have been held to be monitory only, and the powers to be directory, not imperative. (See also *Doe v. Roe*, 1 Anstr. 86; *Attorney-General v. Bishop of Litchfield*, 5 Ves. 825; *Attorney-General v. Dalton*, 13 Be. 141; *Attorney-General v. Cuming*, 2 Y. & C. 139). It is to be remarked, however, that these were cases of charitable trusts, in which a greater degree of latitude is allowed. In a case where the trusts are not charitable, a direction that the donees of the power shall appoint new trustees would perhaps be considered imperative; it is better therefore that powers to appoint new trustees should be declaratory that the donees may appoint—they should be empowered to appoint, leaving it to their discretion to exercise the power when the circumstances of the particular case seem to render it desirable.

Powers to appoint new trustees, imperative or directory.

The costs of an appointment of a new trustee under a power fall on the *corpus* of the trust estate, for the benefit of the appointment enures to all the *cestuis que trust* and not only to the first recipient. See *Re Fellow's Settlement* (2 Jur., N. S. 62); *Re Fulham* (15 Jur. 69); *Ex parte Davis* (16 Jur. 882). See also *Carter v. Sebright* (26 Be. 374). But where a trustee retires, he may, unless he can show some good reason for giving up the trust, have to bear the expense of appointing his successor (*Howard v. Rhodes*, 1 Ke. 581; *Coventry v. Coventry*, id. 758; *Courtenay v. Courtenay*, 3 J. & L. 519). In *Forshaw v. Higginson* (20 Be. 485), Sir J. Romilly, M. R., said, "It is quite settled that a trustee cannot, from mere caprice, retire from the performance of his trust, without paying the costs occasioned by that act. It is also quite clear that any circumstances arising in the administration of the trust which have altered the nature of his duties, justify him in leaving it, and entitle him to receive his costs; but I think

Costs of appointment of new trustee.

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Trustees or trustee for the time being enabled to act.

or administrator for the time being, of the last deceased trustee ; And upon every appointment proper assurances (*m*) of my trust estate shall be executed at the costs of such estate ; AND I DECLARE that the number of my trustees may be increased if deemed expedient, but so that they do not exceed —. AND I FURTHER DECLARE that every new trustee shall be an executor of this my will (*n*), and that all the trusts, powers and

that to justify him in that course, the circumstances must be such as arise out of the administration of the trust, and not those relating to himself. . . . If the circumstances preventing his continuing to perform his duties arose from any act of his own, or anything relating to himself, I think he ought to pay the costs of the appointment of a new trustee."

Appointment of new trustee by the Court.

The Court has inherent jurisdiction in a cause to appoint trustees of a will in a case where no trustees were originally appointed by the testator (*Dodkin v. Brunt*, L. R., 6 Eq. 580). And even before the stat. 13 & 14 Vict. c. 60, the Court could appoint a new trustee, though there was also a power for that purpose, if under the circumstances the power was not exerciseable. And by the 32nd section of the above statute it is enacted, that whenever it shall be expedient to appoint a new trustee or new trustees, and it shall be found inexpedient, difficult or impracticable so to do without the aid of the Court, the Court may appoint, either in substitution for or in addition to any prior trustee or trustees. That a disclaimant is an existing trustee within the meaning of this section, so as to authorize an appointment by the Court of a new trustee in his place, see *Re Tyler's Trust* (15 Jur. 1120). But a new trustee appointed by the Court cannot exercise purely legal powers conferred upon the original trustee (see *Newman v. Warner*, 1 Sim., N. S. 457) ; nor will the Court in appointing new trustees give them (except in cases of charitable trusts) a power of appointing other trustees (*Holder v. Durbin*, 11 Be. 594 ; but see 23 & 24 Vict. c. 145, s. 27, *ante*, p. 129).

Trustee so appointed cannot exercise legal powers.

As to the necessity of conveyance of trust estates to new trustees.

(*m*) The appointment of a trustee has been held not to be complete until the trust estate is conveyed to him (*Warburton v. Sandys*, 14 Sim. 622), *sed qu.* ; see *Welstead v. Colvile* (28 Be. 537) ; also *Bennett v. Burgis* (5 Ha. 295) ; *Noble v. Meymott* (14 Be. 471). Hence, "it is sometimes expressly declared that the new trustees shall be competent to act before they are actually clothed with the legal estate in the trust property ; but such a declaration is superfluous, for the office of trustee is equitable, and the appointment to it is complete, without the formality of a legal conveyance. They may, in virtue of their office, and before any conveyance, even exercise legal powers given to the trustees for the time being, for the question at law would be whether they were well appointed in equity." (2 Hayes, Conv. 215, n.) As to equitable property, see note to Prec. XII., *ante*, p. 216.

Every new trustee an executor.

(*n*) That this is allowed, see *Re Cringan* (1 Hag. 548) ; *Re Deichman* (3 Cur. 123) ; *Re Ryder* (2 Sw. & Tr. 127, 7 Jur., N. S. 196).

discretions which are hereby vested in the trustees herein named, or which are hereinbefore expressed to be given to "my

Executors may, under a power for that purpose contained in the will, keep up the number of executors by fresh appointments from time to time; and the new executors so appointed will be entitled to probate (*Re Deichman*, 3 Cur. 123).

Power of appointing new executors.

That a testator may nominate a person to be an executor of his will in case of the death of one of the persons previously appointed to that office; and that such substituted executor will be entitled to probate, whether the death of the executor for whom he is substituted take place before or after the death of the testator, see *Re Johnson* (1 Sw. & Tr. 17). And see *Re Day* (14 Jur. 490), for a conditional appointment of executor, *Re Lane* (4 N. R. 253), for an alternative appointment, and *Re Langford* (L. R., 1 Prob. 458), for a substituted appointment in case of absence.

Substitution on death of executor.

An executor who has taken out probate in this country, or who has intermeddled with the testator's estate, cannot afterwards renounce (*Re Veiga*, 3 Sw. & Tr. 13; *Re Badenach*, *ib.* 465). The executor of a sole or sole-surviving executor will not be allowed to take out probate of his immediate testator, and renounce the executorship of a will of which his immediate testator was executor (*Re Perry*, 2 Cur. 655; *Brooke v. Haymes*, L. R., 6 Eq. 25): the contrary is stated in some text-books (see Toll. Exors. 45, Burt. Comp. 313), on the authority of Shep. Touch. 464, the *dictum* of Lord Holt in *Wankford v. Wankford* (1 Salk. 309), and the case of *Hayton v. Wolfe* (Cro. Jac. 614). See also *Moss v. Bardswell* (3 Sw. & Tr. 187, 8 W. R. 503). Renunciation need not be under seal (*Re Boyle*, 3 Sw. & Tr. 426); and may be signed by an attorney duly authorized (*Re Rosser*, *ib.* 490). A will of realty only, but containing an appointment of an executor, is entitled to probate, notwithstanding the renunciation of the executor (*Re Jordan*, L. R., 1 Prob. 555). As to retraction of renunciation, see *Re Richardson* (1 Sw. & Tr. 515, 6 Jur., N. S. 326); *Re Morrison* (2 Sw. & Tr. 129, 9 W. R. 518; *Angermann v. Ford* (29 Be. 349); and, as to the next-of-kin retracting renunciation of grant of letters of administration, *Re Park* (6 Jur., N. S. 660). But an executor's power of retracting renunciation is now abolished; for by the Probate Act (20 & 21 Vict. c. 77, s. 79), when a person renounces probate, his rights in respect of the executorship wholly cease; and the executor of the acting executor is the legal personal representative of a testator, in exclusion of an executor who has never proved, acted or renounced (*Re Lorimer*, 2 Sw. & Tr. 471).

Renunciation.

Retraction.

Where a firm are appointed executors, the individual members, and not the firm collectively, are entitled to probate (*Re Fernie*, 6 No. Cas. 657).

Firm appointed executors.

Where a corporation aggregate is appointed executor, letters of administration with the will annexed will be granted to a syndie nominated by

Corporation.

Pr. XXII.

Appointment
of executors
and guar-
dians.

trustees," may be executed by the trustees or trustee for the time being of my will. I APPOINT the said [*trustees*] to be executors of this my will; And I nominate the trustees or trustee for the time being of my will to be guardians or guardian of the persons and estates of my children during their respective minorities. I REVOKE all prior wills. IN WITNESS, &c.

such corporation to take the grant (*Re Darke*, 1 Sw. & Tr. 516, 8 W. R. 273).

Probate by
one executor
sufficient.

Probate of a will by any one executor is sufficient; the usual practice for every executor to prove before he acts, is useful only as it serves for evidence of the acceptance of the trusts (*Watkins v. Brent*, 7 Sim. 512, 1 M. & C. 97; *Strickland v. Strickland*, 12 Sim. 463; *Cummins v. Cummins*, 3 J. & L. 64; *Walters v. Pfeil*, 1 M. & M. 362). And see *Vickers v. Bell* (3 N. R. 624).

Under the 20 & 21 Vict. c. 77, s. 79, and the 21 & 22 Vict. c. 95, s. 16, where an executor, who has neither renounced nor proved, but to whom power has been reserved, survives his acting co-executor, and does not appear to a citation, the grant will go as if his name had never appeared in the will as an executor, and the executors, if any, of the acting executor, or of the survivor of the acting executors, will be the legal personal representative of the original testator (*Re Noddings*, 2 Sw. & Tr. 15; *Re Lorimer*, *ib.* 471, 10 W. R. 809).

No. XXIII.

WILL of a FARMER, disposing of his Personal Property in favour of his Wife and infant Children.
 —Legacies to Children at Twenty-one or Marriage.
 —The Wife to be sole Trustee and Executor during Widowhood; with large discretionary Powers to carry on the Farming Business, and manage the Estate generally.—Wife marrying to have an Annuity; on her Death or Marriage the Property is vested in Trustees for the Benefit of the Children.
 —Devise of Mortgage and Trust Estates.—Power to compound Debts, &c.—Provisions for appointing and indemnifying Trustees.

THIS IS THE LAST WILL AND TESTAMENT of me, [*testator's name, &c.*] I GIVE to each child of mine, who, being a son, shall at my death have attained the age of twenty-one years, or shall afterwards attain that age, or, being a daughter, shall at my death have attained that age or have been married, or shall afterwards attain that age or be married, a portion of £200, to be paid to children being at my death objects of this gift at the end of six calendar months after that event, and to children subsequently becoming objects thereof at the end of six calendar months after they shall respectively become such objects; but advances (a) made by me to any child or

Portions to sons at twenty-one; daughters at twenty-one or marriage.

(a) Where a testator subsequently to the date of his will advances on marriage or otherwise a sum of money to a child to whom he has bequeathed a pecuniary legacy, the advancement will be a satisfaction either wholly or *pro tanto* as the case may be (*Ex parte Pye*, 18 Ves. 140; *Rawlins v. Powell*, 1 P. W. 299; *Ellison v. Cookson*, 3 Br. C. 61; *Thellusson v. Woodford*, 4 Mad. 420; *Pym v. Lockyer*, 5 M. & C. 29); but not if the legacy is of something different from the advancement, as, where one is of an annuity and the other is of a gross sum, or one of a gross sum and the other of a stock-in-trade (*Holmes v. Holmes*, 1 Br. C. 555); nor even where the subject-matter of each is the same, if they are made *diverso intuitu* (*Roome v. Roome*, 3 Atk. 181; *Bell v. Coleman*, 5 Mad. 24); nor where the advancement is subject to a contingency not affecting the legacy

As to ademption of legacies to children by advancements.

Pr. XXIII.

Wife empowered to carry on farm.

children in my lifetime shall, according to the amount thereof, be taken in full or in part satisfaction of his, her or their portion or portions, unless I shall otherwise declare by codicil to this my will (b). I EMPOWER my wife [name] to carry on my farming and grazing business, and for that purpose to continue tenant of the farm which I shall use at my decease, or to hire and use any other farm, and employ my live and dead agricultural stock (c), and such part of my personal

Adeemption by advancement.

(*Spinks v. Robins*, 2 Atk. 491; *Crompton v. Sale*, 2 P. W. 553). It was held in *Freemantle v. Bankes* (5 Ves. 79), that a bequest of a residue or part of a residue (being of uncertain amount) was not adeemed by a subsequent advancement of a portion; but in *Montefiore v. Guedalla* (1 D. F. & J. 93), *Schofield v. Heap* (27 Be. 93), *Beckton v. Barton* (Ib. 99), it was decided that a portion is wholly or *pro tanto* a satisfaction of a prior bequest of an aliquot part of a residue, in the same manner as of a legacy of fixed amount. See *ante*, p. 243.

Adeemed legacy, not revived by codicil.

A legacy which has been adeemed by an advancement is not revived by a codicil subsequent to the advancement, even though the codicil confirms the will and all the bequests therein (*Powys v. Mansfield*, 3 M. & C. 376; *Montague v. Montague*, 15 Be. 565).

Perhaps it may be stated generally, that where a testator has bequeathed a sum of money for a specific purpose, and afterwards himself expends the money in effecting such purpose, the legacy is satisfied (see *Husbands v. Husbands*, 1 Ver. 95; *Maher v. Linigan*, 15 L. T. 97): but cases of this kind seem to be distinct from the general doctrine of satisfaction before stated, which is applicable exclusively to legacies by parents, or persons standing *in loco parentis*; on which ground bequests by a putative father (*Debeze v. Mann*, 2 Br. C. 165), or by a grandfather in the lifetime of the father (*Roome v. Roome*, 3 Atk. 183), have been held not to be satisfied by subsequent advancements; but it would seem, according to the doctrine of *Powys v. Mansfield* (3 M. & C. 359), that the existence of the father does not preclude its being shown, even by extrinsic evidence, to have been the actual intention of the testator to assume the parental office in regard to the duty of providing for the objects in question.

See further, as to the satisfaction or adeemption of a legacy by a portion, the notes to *Ex parte Pye*, in 2 Tud. L. C. Eq. 331, *et seqq.*

Evidence of advances.

(b) Subsequent unattested statements in testator's handwriting are admissible as evidence of the amount of the advances (*Whateley v. Spooner*, 3 K. & J. 542: see also *Hall v. Hill*, 1 Dr. & War. 94; *Kirk v. Eddowes*, 3 Ha. 509; and *Maher v. Linigan*, 15 L. T. 97, before the Lord Chancellor of Ireland).

Emblements.

(c) As between the heir and executor, emblements belong to the executor; but as between an executor and a devisee, the emblements belong to the devisee, unless they are expressly bequeathed (Co. Lit. 55 b, n. by Harg. & Butl.; Shep. Touch. 472). Under a will in which there was a specific devise to A. of land, and a bequest to B. of "all my personal

estate as she shall think fit, with liberty for her at any time to transfer the business to any son or sons of mine, or

estate and effects whatsoever and wheresoever not hereinbefore specifically bequeathed," it was held that the emblements passed with the land to A. (*Cooper v. Woolfitt*, 2 H. & N. 122). Emblements ;

Emblements comprise not only corn crops, but also hops, saffron, flax and hemp (4 Burn's Eccl. L. 299); and the law of emblements extends also (it would seem) to artificial grasses, clover, saint-foin, and the like (*Graves v. Weld*, 5 B. & Ad. 105), to roots in gardens, as turnips, carrots, potatoes (Co. Litt. 55 b.; *Evans v. Roberts*, 5 B. & C. 832), and generally to whatever is produced for annual profit by labour and cultivation. But the law of emblements does not extend to produce beyond that of the current year (see *Graves v. Weld*, *ubi sup.*; as to teazles, see *Kingsbury v. Collins*, 4 Bing. 202, 5 B. & Ad. 120); nor to growing crops of grass (even though sown from seed, and ready to be cut for hay); nor to timber or fruit trees, fruit on trees, shrubs or plants (*Empson v. Soden*, 4 B. & Ad. 655), except in the case of a gardener or nurseryman by trade (*Penton v. Robart*, 2 Ea. 90; *Wyndham v. Way*, 4 Tau. 316); nor generally to anything which is not planted or produced annually at the expense and by the labour of the occupier. See also 1 Wms. Exors. 670; *Amos & Ferard*, Fixtures, 206. —comprise what.

It seems that a bequest of farming stock will, in general, carry growing crops (*West v. Moore*, 8 Ea. 339; *Cox v. Godsalve*, 6 Ea. 604, n.); but in *Vaisey v. Reynolds* (5 Rus. 12), Sir John Leach, M. R., considered that this rule was confined to cases in which the legatee of the farming stock was also the residuary legatee of the general personal estate, a distinction which seems not very satisfactory. See also *Rudge v. Winnall* (12 Be. 357), where there was a devise to A., and a bequest of all live and dead stock and all personal estate to B., it was held that the emblements on the real estate passed to B. Of course, if the testator be not the owner of the land on which the crops are growing, the question as to emblements being included in a bequest of farming stock, can arise only between the legatee of the farming stock on the one hand, and the residuary legatee or executor on the other hand: in such a case, it seems that, irrespective of the distinction taken by Sir J. Leach, the legatee of the farming stock is entitled to the emblements. The severance of the emblements from the land is a necessary consequence of the non-ownership of the farm by the testator: but if the testator were the owner of the land, and if the matter were now *res integra*, one would feel strongly disposed to question whether a bequest, either particular or residuary, of farming stock, ought to exclude the title of the devisee of the land or the heir to the crops growing thereon at the testator's decease, which, being part and parcel of the land, should go therewith, unless an intention to sever them be distinctly shown. Probably, however, at the present day, the Courts would not consider themselves at liberty to question the sufficiency of a bequest of farming stock to carry growing Bequest of farming stock.

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Wife empowered to manage and invest the personal estate at her discretion.

Wife to take the profits and income, bringing up the infant children, except married daughters.

Wife marrying again to receive an annuity for her separate use, and deliver up the trust property.

Cesser of annuity on alienation.

admit any son or sons of mine to a share thereof, and lend to him or them the capital employed or requisite to be employed therein, or any part thereof, upon such security and such terms as she shall think reasonable. I EMPOWER my said wife to manage my personal estate generally in such manner as shall appear to her to be most advantageous to my family, with liberty, at her discretion, either to permit it to continue in the state in which it shall be found at my death, or to get it in, and invest the proceeds in her name, upon any stocks, funds or securities, or at any rate of interest, or in the purchase of any real or personal property, and to vary the investment when and as she shall think fit, but any real property so purchased shall be considered as converted into and treated as personalty for all the purposes of my will. I GIVE to my said wife all the income of so much of the personal estate to which I shall be entitled at my decease as shall be in anywise employed or invested, inclusive of the profit of the said business, and also the use of the residue thereof, but charged with the maintenance, education and bringing up, in a manner suitable to their station in life, of my sons for the time being under the age of twenty-one years, and my daughters for the time being under that age not being or having been married. IN the event of my said wife marrying again, I thenceforth ANNUL the powers and benefits hereinbefore given to my said wife, and GIVE to her an annuity of £25 during the remainder of her life, payable quarterly into her proper hands and on her personal receipt, as a separate and inalienable provision, the first payment to accrue due and be made at the end of three calendar months after her marriage, if she shall within that time account for and deliver up my personal estate in her hands to the other trustees or trustee for the time being of my will, to their or his satisfaction; and, if not, then at the end of three calendar months after such accounting and delivery. AND I DECLARE that, if my said wife shall, either before or after such her second marriage, do or suffer any act or thing whereby her said annuity of £25, or any part thereof, shall be aliened or incumbered, the same annuity shall thereupon cease. I DECLARE

crops against as well the person entitled to the land as a residuary legatee.

Pr. XXIII.

that, on the death or marriage of my said wife, my personal estate shall vest in the other trustees or trustee for the time being of my will, who shall have the same power and liberty in regard to my business as I have given to my wife by the second clause of my will, carrying on the same for such period as the circumstances of my estate or my family shall, in the opinion of my said trustees or trustee, render it convenient or desirable so to do; and, subject thereto, shall convert or get in my personal estate, not invested in stocks, funds or securities of the United Kingdom, or on real securities in the United Kingdom, and invest and place out the produce in and upon investments of the aforesaid but not of any other descriptions, but with liberty to continue any investments of a different description which they or he shall think it inexpedient to disturb, and with power to vary from time to time the investment of my personal estate, so as the investment be confined to stocks, funds or securities of the descriptions aforesaid. I DECLARE that the said trustees or trustee shall hold my personal estate, from and after the death or marriage of my said wife, IN TRUST for my child, if only one, wholly, or all my children (*d*), if more than one, equally, to be absolutely vested in a son or sons at the age of twenty-one years, and in a daughter or daughters at that age or marriage; And, as to the share or shares, original and accruing, of a son or sons dying under that age, and of a daughter or daughters dying under that age without having been married, IN TRUST for the other or others of my children conformably to the preceding trust; With power for the said trustees or trustee to apply the whole or part of the income, and any part not exceeding one moiety of the capital of each child's original and accruing share not absolutely vested, for his or her benefit by way of maintenance, advancement or otherwise, and the unapplied income of each such share shall be accumulated, and the accumulations be deemed an accretion to the same share. I DEVISE all lands and hereditaments which shall at my decease be vested in me as mortgagee or trustee, in fee or otherwise, UNTO AND TO THE

On wife's death or marriage, the property to vest in other trustees; their powers and duties as to farming, converting and investing.

Trust property given on death or marriage of wife to children equally;

—accruer;

—maintenance and advancement.

Devise of mortgage and trust estates.

(*d*) As to the propriety of providing for the death of a child in the testator's lifetime leaving issue, see sect. 33, *ante*, p. 56, and notes (*e*) and (*g*) to Prec. XXI., *ante*, pp. 336, 337.

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Appointment
of wife dur-
ing widow-
hood to be
trustee, &c.—
substitution
on her death
or marriage
—powers to
compound
debts and
give receipts;

Power to
appoint new
trustees.

USE of my friends [*names*, &c.], their heirs, executors, administrators and assigns, subject to the trusts and equities affecting the same respectively, and to the purposes of my will.

I APPOINT my said wife, during widowhood, and on her death, or if she shall marry again then on her marriage, my said friends [*names*], to the offices of executor and trustee of my will and guardian of my infant children, with full powers to compound and compromise debts and claims, and settle my accounts and affairs, and to give receipts for moneys paid or accounted for to my estate by purchasers or others, who shall be exonerated by such receipts from all liability in respect of the application of the money. AND I DECLARE, so far as concerns the trusteeship of my said friends, that vacancies occurring therein from death in my lifetime or otherwise, disclaimer, resignation, unfitness or incapacity, may from time to time be supplied by the other trustees or trustee for the time being, or, if none such, then by the disclaiming or resigning trustees or trustee, or, if also none such, by the acting executors or executor for the time being, or the administrators or administrator for the time being, of the last deceased trustee. I REVOKE all prior wills. IN WITNESS, &c.

No. XXIV.

WILL of a large LANDED PROPRIETOR.—*Confirmation of Testator's Marriage Settlement.—Charge of Annuities.—Additional Jointure Rent-charge for Wife.—Term for raising Money in aid of Personal Estate to pay Debts and Legacies.—Term for raising Wife's Rent-charge and Portions for Testator's younger Children.—Limitations in strict Settlement to the Testator's Issue, with Remainders to his collateral Relations (Female Tenants for Life taking the Rents to their separate Use).—Powers to Tenants for Life to charge with Jointures; to limit Life Estates to Husbands; to charge with Portions for younger Children; to grant Leases; to sell, exchange, partition, enfranchise, and grant Licences to Copyholders.—Clause injoining the Use of Testator's Name and Arms.—Devise of Copyhold and Leasehold Estates upon corresponding Trusts.—Plate, &c. to be enjoyed as Heir-looms.—Bequest of Carriages, &c. to Wife.—Direction to keep up Testator's Establishment for a short Period.—Bequest of the Residue of Personal Estate to Trustees for Investment in Land, to be settled to the Uses of the devised Estate.—Devise of Mortgage and Trust Estates.—Provisions for Indemnity of Purchasers, &c.; for changing Trustees, and their Indemnity.—Appointment of Executors and Guardians.*

THIS IS THE LAST WILL AND TESTAMENT of me, [*testator's name, &c.*] I CONFIRM the settlement made in contemplation of my marriage with my present wife [*name*], of my freehold estate at —, which is thereby limited after my death to uses for securing a jointure rent-charge of £—— a year to my said wife for her life, and, subject thereto, to the use of the sons of our marriage successively in tail male, with reversion to myself in fee-simple. I GIVE to the several persons next hereinafter

Confirmation of settlement made on testator's marriage.

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—
Gift of life
annuities,
charged on
particular
lands, with
power of dis-
tress.

Devise of
freehold
estates;

—as to part,
to trustees,
for 500 years;

—as to all
the estates;
to testator's
wife a rent-
charge for
life in addi-
tion to her
jointure, with
power of
entry;

named, for their respective lives, yearly sums of the respective amounts next hereinafter specified; (that is to say), To [*annuitant's name, &c.*], £—; To —, &c.; which yearly sums shall issue as rent-charges out of all my freehold lands in the parish of —, and be payable half-yearly, on the 24th day of June and the 25th day of December, the first payment to be made [*or, a proportionate part for so much of the current half-year as shall be unexpired at my death to be paid*] on such of the same days as shall happen next after my decease, with a proportionate part of the said annuities respectively down to the deaths of the respective annuitants, and to be recoverable by the respective annuitants in like manner with rent reserved on common demises. I DISPOSE of all the freehold hereditaments of which I am or may at my decease be competent to dispose for an estate of inheritance, with their appurtenances, including my reversion in fee in the said estate comprised in my said marriage settlement (but, as to my said lands at — aforesaid, hereinbefore charged with the payment of the said annuities, subject to such charge), in manner following; (namely), As to my hereditaments at —, at the date of this my will let to [*name of tenant*], at the yearly rent of £—, To [*first set of trustees*], their executors, administrators and assigns, for the term of five hundred years to be computed from my death, without impeachment of waste, upon the trusts hereinafter expressed; And, as to the same hereditaments subject to such term, and as to all other the hereditaments aforesaid, to the intent (*a*) that my said wife may receive, out of the rents during her life, a yearly rent-charge of £—, in addition to the jointure provided for her by my said marriage settlement, by equal quarterly payments, at Lady-day, Midsummer, Michaelmas and Christmas, clear of all deductions, but without any proportional part thereof down to her death, the first quarterly portion to be payable on such of the same days as shall first happen after my decease, and that she may have the same remedy, by distress, for recovering such rent-charge as lessors have by law for the recovery of rent in arrear; and may also, as an additional remedy, when and so often as the same rent-charge shall

(a) That the words "to the intent," will create a *legal* rent-charge, see 27 Hen. 8, c. 10, ss. 4, 5.

be in arrear for twenty-one days, enter into possession (such possession to be without impeachment of waste) and receive the rents of the said hereditaments, until the arrears, with the said payments to accrue during such possession, and all consequential costs and expenses, shall be satisfied; And, subject to the same rent-charge and remedies, To [*second set of trustees*], their executors, administrators and assigns, for the term of one thousand years to be computed from my death, without impeachment of waste, upon the trusts hereinafter expressed. AND, subject to such term, I DEVISE all the hereditaments aforesaid To every son of mine, and his issue male in succession, so that every elder son and his issue male may be preferred to every younger son and his issue male, and so that every such son may take an estate for his life, with remainder to his first and every subsequent son successively, according to seniority, in tail male; And, on failure of such issue, To every daughter of mine, and her issue male in succession, so that every elder daughter and her issue male may be preferred to every younger daughter and her issue male, and so that every such daughter may take an estate for her life, with remainder to her first and every subsequent son successively, according to seniority, in tail male; But subject to a limitation in immediate precedence of the life estate of each daughter, To [*trustees*], their executors, administrators and assigns, for a term of one hundred years, if she shall so long live, UPON TRUST to pay the rents to such daughter, for her separate use, free from marital control, but without power of alienation or anticipation, and her receipts alone to be discharges; And on failure of such issue, To the first and every subsequent daughter successively, in tail male, of every son and daughter of mine, in the order in which my said hereditaments are hereinbefore limited to the sons of every son and daughter of mine; And on failure of such issue, To the first and every subsequent son, and the first and every subsequent daughter successively, in tail, of every son and daughter of mine, in the order in which my said hereditaments are hereinbefore limited in tail male to the sons and daughters of every son and daughter of mine; And on failure of such issue, To every brother of mine born in my lifetime, and his issue, for the same estates and in the same order as my said hereditaments are hereinbefore limited to every son of mine and his issue;

To trustees for 1,000 years; subject thereto,

—to testator's sons for life, remainder to their first and other sons in tail male;

—to testator's daughters for life (subject to a term limited to trustees for their separate use), remainder to their first and other sons in tail male;

—to first and other daughters of testator's sons and daughters in tail male;

—to first and other sons and daughters of testator's sons and daughters in tail;

—to testator's brothers born in his lifetime, for life, with like remainders to their issue;

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—to testator's brothers born after his death, in tail male and tail;

—to testator's sisters and their issue in like manner;

[Or—to a brother *nominatim*, for life; remainder to his sons and daughters born in testator's lifetime, for life; remainder to their issue; remainder

—to sons and daughters of testator's brother born after testator's death, in tail male, and in tail; remainder

—to another brother *nominatim*, and his issue, in like manner; remainder

—to a sister *nominatim* (subject to a term limited to trustees for her separate use), and her issue, in like manner; remainder

—to another sister *nominatim*, and her issue, in like manner; remainders over.]

[Or—to testator's lineal and collateral relations in strict settlement (a suc-

And on failure of such issue, To every brother of mine born after my death, and his issue, for the same estates and in the same order as my said hereditaments are hereinbefore limited to the first and every subsequent son of every son of mine; And on failure of such issue, To every sister of mine born in my lifetime, and her issue, for the same estates, and in the same order, and subject to the same limitations, as my said hereditaments are hereinbefore limited to every daughter of mine and her issue; And on failure of such issue, To every sister of mine born after my death, and her issue, for the same estates and in the same order as my said hereditaments are hereinbefore limited to the first and every subsequent daughter of every son of mine; And on failure of such issue [or, To my brother (*name*), for his life, and after his death, To every son and daughter born in my lifetime of my said brother, and the issue of such son and daughter, for the same estates and in the same order, and, as to daughters, subject to the same limitations, as my said hereditaments are hereinbefore limited to every son and daughter of mine and his or her issue; And on failure of such issue, To every son and daughter born after my death of my said brother, and the issue of such son and daughter, for the same estates and in the same order as my said hereditaments are hereinbefore limited to the first and every subsequent son, and the first and every subsequent daughter, of every son and daughter of mine; And on failure of such issue, To THE USE of my brother [*name*], and his issue, for the same estates and in the same order as my said hereditaments are hereinbefore limited to my said brother [*name*], and his issue; And on failure of such issue, To my sister [*name*], the wife of [*name*, &c.], and her issue, for the same estates and in the same order, and subject to the same limitations, as my said hereditaments are hereinbefore limited to every daughter of mine and her issue; And on failure of such issue, To THE USE of my sister [*name*], and her issue, for the same estates and in the same order, and subject to the same limitations, as my said hereditaments are hereinbefore limited to my said sister [*name*] and her issue]: [or, To my sons and daughters and my brothers and sisters and their respective issue, in the order, for the estates, and in manner following (namely), first, to my sons and their issue; secondly, to my daughters and their issue; thirdly, to my brothers and their

*cinct and
comprehensive
form).]*

issue; and, lastly, to my sisters and their issue; every elder son, daughter, brother, and sister, and his or her issue, to be preferred to every younger, and his or her issue; and every son and daughter of mine, and every brother and sister of mine born in my lifetime, to be tenant for his or her life, without impeachment of waste, with remainder to his or her first and other sons successively, by seniority, in tail male, with remainder to his or her daughters successively, by seniority, in tail male, with remainder to his or her sons successively, by seniority, in tail, with remainder to his or her daughters successively, by seniority, in tail; and every brother and sister of mine born after my death to be tenant in tail male, with remainder to himself or herself in tail; but so that the estate of every female tenant for life shall be immediately preceded by the limitation of a term of one hundred years, determinable on her death, to [trustees], their executors, administrators, and assigns, UPON TRUST to pay the rents into her own hands, to be enjoyed by her as a separate income, free from marital interference, and without power of alienation or anticipation; And on failure of such issue], To my own right heirs. AND I DECLARE every estate for life hereinbefore limited to be unimpeachable for waste (b). I DECLARE that the said term of five hundred years

—to testator's
right heirs.

Life estates
to be without
impeachment
of waste.

(b) In the earlier editions of this work, trust estates for preserving the contingent remainders created by the will were here interposed; for, according to the law which prevailed previously to the 1st January, 1845, a contingent remainder was liable to be defeated by the forfeiture or merger of the particular estate of freehold. Thus, if lands were limited to A. for life, with remainder to his first and other sons in tail, with reversion to the right heirs of A.; and A., before the birth of a son, made a conveyance in fee simple to any third person; the inevitable effect of such conveyance was to defeat the contingent remainder by the merger of the estate for life. Hence the expediency of the interposition of a remainder between the estate for life and the contingent remainder to the unborn sons, which of course prevented the merger of the estate for life in the reversion in fee, and thereby rendered the intermediate remainder indestructible. By 10 & 11 Will. 3, c. 16, posthumous children are enabled to take estates as if born in their father's lifetime, although there be no limitation to trustees to preserve. And in other cases the necessity for limitations of this nature is now removed, by the Act of 8 & 9 Vict. c. 106, s. 8, which provides, "that a contingent remainder, existing at any time after the 31st day of December, 1844, shall be, and if created before the passing of this Act shall be deemed to have been, capable of taking effect, notwithstanding the determination by forfeiture, surrender, or merger of any pre-

Contingent
remainders.

10 & 11 Will.
3, c. 16.

8 & 9 Vict.
c. 106.

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Trusts of 500

hereinbefore limited to the said [*first set of trustees*] is so limited UPON TRUST, in case my personal estate, not hereinafter

Contingent
remainders.

ceding estate of freehold, in the same manner in all respects as if such determination had not happened."

Some draftsmen hesitate to rely on this enactment, and recommend the continued adoption of the old scheme for preserving contingent remainders by means of an estate of freehold vested in trustees. An able writer, who seems inclined to advise this course, observes, that, "If land is limited to A. for life, with remainder to the first and other sons of B. successively in tail, with remainder to C. in fee, and A. surrenders his life estate to C., and afterwards B.'s first son is born, A. being still alive, the limitation to such son in tail will take effect as a vested remainder, 'in the same manner in all respects' as if A.'s estate had not so determined. Now if A.'s estate had not so determined, the estate of B.'s eldest son would have taken effect as a vested remainder expectant on A.'s life estate, capable of being accelerated in enjoyment by the surrender of A.'s life estate. But A.'s life estate, being merged, cannot be the subject of a surrender, and therefore the estate tail cannot be accelerated in enjoyment. How then can it be said to be capable of taking effect in all respects as if the prior estate had not determined? It would be difficult to describe with accuracy the position of C., who by virtue of an estate in remainder, is entitled, during the life of a stranger in estate, to hold the possession of the land in priority to the owner of the preceding vested estate. The estate tail, although in the position of an estate in remainder, will not be subject to any protectorship, for the office of protector only exists during the subsistence of the prior estate (stat. 3 & 4 Will. 4, c. 74, s. 22). If the settlement contains a power of leasing to be exercised by the tenant for life during his life, and by the trustees during the minority of any child entitled under the limitations to the actual possession of the lands, the trustees would not be able to lease during A.'s life, notwithstanding the merger of his life estate; but it should seem that A. might exercise the power with the concurrence of C." (Sweet's Stat. Conv. 8 & 9 Vict., p. 5.)

Remarks on
8 & 9 Vict.
c. 106, s. 8.

In order to give full scope to the words "shall take effect in the same manner in all respects," it would seem to be necessary to hold, that, in the particular case described, on the object of the contingent remainder coming into existence, the prior estate for life, which had become merged in the next vested remainder, should be revived. This, and nothing less than this, would place the mesne contingent remainderman in the same position "in all respects" as if the surrender had not taken place. And there is not, it is submitted, any difficulty in the way of such a construction. The effect merely is, that the merger, which had been produced by the surrender of the estate for life to the next remainderman, becomes a merger *sub modo* only, *i. e.* it continues in force and operation until the intermediate contingent remainder takes effect, and no longer; and when that event occurs, in other words, when the object of the intermediate contingent

bequeathed to my said wife, shall be insufficient to satisfy my debts, funeral and testamentary expenses, and the pecuniary

—
years' term,
for raising
money in aid

remainder comes into existence, that remainder takes effect as such, and the tenant for life resumes his original position, in the same manner as if no act affecting his estate had been done. Even, however, if it be thought that the revival of the estate for life is not warranted by the language of the enactment, it is presumed that its efficacy would not be endangered. The effect would then be, that, when the owner of the surrendered estate for life dies, the contingent remainder immediately expectant thereon would take effect in possession in the same manner as if there had been no surrender of the life estate; and in the meantime the object of such preserved limitation stands towards the person entitled to the prior estate for life, or rather to the vested remainder in which such estate for life had become merged, in the singular and anomalous position described by Mr. Sweet, he having the same rights and remedies as a remainderman, though not strictly sustaining that character; and the surrenderee of the estate for life having, as against the object of the preserved remainder, the limited rights of a mere tenant for life, though being in point of fact seised of the immediate inheritance. This construction, though it eventually brings about the result contemplated by the Legislature, accomplishes that result, it is conceived, in a manner less consistent with principle, and far less creditable to the law as a science, than the interpretation first suggested. But even the latter construction, with all its disadvantages, is of course greatly to be preferred to holding the Legislature to have wholly failed in effecting the preservation of contingent remainders. To arrive at such a conclusion, in regard to a remedial statute, because the framer had omitted to describe in full and explicit terms the mode of its operation in a particular case, would, it is submitted be a signal departure from the liberal principles of interpretation which have always obtained in such cases. (See an illustration of this in *Harris v. Davidson*, 15 Sim. 133.)

Contingent
remainders.

Mr. Sweet remarks, however (9 Jarm. Byth. 308), that the observations here commented on "were not intended to suggest that the enactment would fail to preserve the contingent remainder, but merely to show that circumstances may occur in which its position, though safe, will be equivocal or anomalous;" but repeats his opinion, that "on the whole, it will be advisable, in drawing settlements and wills, to rely on the well-understood protection of the common limitations to trustees to preserve contingent remainders, rather than on this ambiguous enactment." See also 3 Dav. Conv. by Waley, 205—208, 247—249.

It is submitted that the sole object of the enactment is to prevent the destruction of contingent remainders by the act of the owner of a preceding estate. Consequently, it is still essential that a contingent remainder should vest previously to, or at the instant of, the natural determination of the prior estate of freehold, that is, a determination which is not occasioned by "forfeiture, surrender or merger;" if, therefore, the contingency upon

To what ex-
tent still
liable to
failure.

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of personal
estate, to pay

legacies hereinafter bequeathed, then out of the rents and profits of the hereditaments comprised in the same term, or by mort-

Contingent
remainders,
when liable
to failure.

which the remainder is to take effect has not happened when such particular estate determines, the remainder absolutely fails. The consequence is, that, if the legal estate in freehold lands is limited by will or otherwise to A. for life, and after his decease to such of the children of A. as may live to attain the age of twenty-one years, and it happens that at the time of A.'s decease he has no child who has attained majority, the children of A. who may afterwards answer the required description are excluded. (See *ante*, pp. 205, 206). So, if freehold lands are limited to A. for life, with remainder to the children of B. (under which limitation any child would acquire a vested interest immediately on its birth), and it happens that A. dies before B. has a child born, the remainder limited to such children absolutely fails. In both the preceding cases this consequence may and still ought to be prevented, by interposing between the particular estate and the contingent remainder an estate of freehold in trustees for the express purpose of preserving the contingent remainder, and extending, of course, through the whole period of suspense of the contingency or event on which the remainder is dependent. (See Letter of H. B. Ker, Esq., to the Lord Chancellor, Davidson's Conc. Prec., pp. 10, 36.)

As to whether the determination of a life estate by a shifting clause contained in the instrument creating the settlement is a "forfeiture" within 8 & 9 Vict. c. 106, s. 8, see 4 Dav. Conv. by Waley, 331, 332.

Suppose the legal estate in freeholds limited to A. for life, remainder to his first and other sons in tail (no trustees to preserve); B. the first son, having by a disentailing assurance with the consent of A. acquired the fee simple in remainder, incumbers, and dies intestate, leaving A. his heir. The life estate merges, and the charges are let in; *secus*, if there had been trustees to preserve.

Copyholds.

A contingent remainder in copyholds is not (and was not, before 8 & 9 Vict. c. 106) liable to destruction by the premature failure by forfeiture, surrender or merger of the particular estate before the remainder is capable of vesting; the freehold, vested in the lord, preserves the contingent remainder until the time when the particular estate would regularly have determined (*Mildmay v. Hungerford*, 2 Ver. 243; *Pickersgill v. Grey*, 30 Be. 352; *Fearne*, 319, 320; 1 Watk. Cop. 196; 1 Scriv. Cop. 402). But if the contingent remainder be not ready to come into possession at the instant of the natural and regular determination of the particular estate, then such remainder fails altogether (*Lane v. Pannell*, 1 Roll. Rep. 238, 317, 438; *J. Williams*, R. P. 369; *Gilb. Ten.* 266; *Fearne*, 320; 1 Scriv. Cop. 404; 9 Jarm. Byth. 309, n.; and see 2 Ves. j. 214).

Equitable
contingent
remainders
not destruc-
tible.

Where the subject of the devise is an equitable interest only (the legal inheritance being outstanding in a mortgagee or trustee, or being by the same will vested in trustees), the equitable remainders created by such will are not liable to failure or destruction under the rule above adverted to,

gage or sale (c) of the same premises, or any part thereof, or by any other means, to raise in aid of my personal estate not so bequeathed, so much money as shall be sufficient to satisfy the same debts, expenses and legacies, and to pay such money to my executors or administrators, who shall apply the same accordingly, and whose receipt shall exonerate the trustees or trustee of the said term of five hundred years from all liability in respect of the application thereof. AND I DECLARE that the

debts and legacies.

Trusts of

which is applicable exclusively to legal remainders. This was established so long ago as the case of *Chapman v. Blissett* (Ca. t. Talb. 145), where freehold lands were devised to trustees in fee, upon trust to apply the rents in a certain manner during the life of A., and after his decease, as to one moiety, in trust for the children of A., and as to the other moiety in trust for the children of B. B. had no child at the decease of A., but a child was born afterwards; and it was held by Lord Talbot that such child was entitled, although not *in esse* at the determination of the life interest of A., on the ground that the subject of the devise was a mere equitable interest. "In regard to trusts," observed his Lordship, "the rules are not so strict as at law; for the whole legal estate being in the trustees, the inconvenience of the freeholds being in abeyance, if the particular estate determines before the contingency (upon which the remainder depends) does happen, is thereby prevented; there being always a sufficient tenant to the præcipe, the defect of which was the sole mischief the law provided against. And even the reason is not now so strong as when real actions, which can be brought against the tenant of the freehold only, were more in use. The whole, therefore, being in the trustees, supports the several uses that are to arise out of their interest, which continuing in them until the birth of the plaintiff, whether it be taken as a future limitation, or as a contingent remainder of a trust, is good either way." Contingent remainders of trust or equitable estates (which, in fact, are executory interests) do not, like legal contingent remainders, fail on the determination of the prior estate, but await the happening of the contingency on which they are limited (*Hopkins v. Hopkins*, Ca. t. Talb. 44; 1 Atk. 581).

Equitable contingent remainders.

Any attempt to entail personalty will give the absolute interest therein to that person who, if the subject-matter were realty, would be the first tenant in tail or in fee (*Leventhorpe v. Ashbie*, Roll. Ab. 831, pl. 1; Tud. L. C. R. P. 763; *Harvey v. Towell*, 7 Ha. 281, and the cases there cited). See also *ante*, p. 73, n. (i).

Attempt to entail personalty.

(c) See *ante*, p. 165, n. (a), as to the impolicy of giving a power to sell real estate for a term of years only. The 500 years' term in this will comprises (*ante*, p. 378) only a portion of the testator's estates, and this portion may be selected from outlying lands. As the term of 1,000 years comprises the whole of the settled estates, including the family mansion (p. 379), the power to sell is expressly negatived.

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1,000 years' term—1. For better securing rent-charge limited to testator's wife—2. For raising portions for testator's younger children.

said term of one thousand years hereinbefore limited to the said [second set of trustees] is so limited to them UPON TRUST, in the first place, for securing to my said wife and her assigns the yearly rent-charge hereinbefore limited to her, and for that purpose, when and so often as the same rent-charge shall be in arrear for thirty days, out of the rents and profits of the hereditaments comprised in the same term, or by mortgaging or otherwise incumbering, but not by selling, the same hereditaments, or any part thereof, to raise and satisfy the arrears of the said rent-charge, with all incidental costs and expenses; and, subject to the trust aforesaid, UPON FURTHER TRUST, in case any child or children of mine, other than an eldest or only child entitled to the freehold or inheritance of the said hereditaments under the limitations hereinbefore contained, shall, being a son or sons, attain the age of twenty-one years, or, being a daughter or daughters, attain that age or be married, then, in like manner to raise, for the portion or portions of such child or children, if only one, the sum of £——; or, if two and no more, the sum of £——, to be divided equally between them; or, if three or more, the sum of £——, to be divided equally amongst them; in addition to the provision made for the said child or children by my said marriage settlement, the portion or portions of a son or sons to be raiseable and payable when and as he or they shall respectively attain the said age, and the portion or portions of a daughter or daughters to be raiseable and payable when and as she or they shall respectively attain that age or be married, with interest after the rate of four per cent. per annum on the said portion or portions from the period or respective periods at which the same ought to be raised and paid, until the same shall be actually raised and paid. I DECLARE that when the trusts of the said terms of five hundred years and one thousand years respectively shall be satisfied or become unnecessary, the same terms shall respectively cease. I EMPOWER every tenant for life under the limitations herein contained, whether entitled in possession or not, either in contemplation of or after marriage, by deed, revocable or irrevocable, to be executed by him in the presence of and attested by one or more witness or witnesses, or by his will, to appoint (but without prejudice to any prior subsisting uses or powers) to or in favour of any and every woman whom he shall marry

Cesser of terms.

Power to male tenants for life to limit jointures to wives.

or have married, a yearly rent-charge or rent-charges not exceeding in the whole the sum of £——, to be issuing out of my said hereditaments, or any part thereof, and to commence from the decease of such tenant for life, and to be payable half-yearly during the life of such woman, for her jointure, and in bar of dower, with the usual powers and remedies by distress and entry for securing the payment thereof, and also to limit the hereditaments so charged to a trustee or trustees for a term of years, to commence from the decease of such tenant for life, without impeachment of waste, upon proper trusts for securing the appointed yearly rent-charge, and subject to a proviso for cesser; but no rent-charge to be appointed under this power shall take effect as an actual charge, unless the appointor shall be, or afterwards become, entitled in possession to the said hereditaments, or would, if living, have been so entitled under the limitations herein contained; and if the said hereditaments would under this power be liable, at any one time, to the payment of a larger yearly sum in the whole than £——, then the posterior charge or charges shall not take effect, or shall only partially take effect in possession, until the amount of the previous charge shall cease or be diminished, so as always to limit the existing annual charge to the sum lastly specified. I EMPOWER every female tenant for life under the limitations herein contained, whether entitled in possession or not, either in contemplation of or after marriage, by deed revocable or irrevocable, to be executed by her in the presence of and attested by one or more witness or witnesses, or by her will, to appoint (but without prejudice to any prior subsisting uses or powers) to or in favour of any husband to whom she shall be or have been married, my said hereditaments, or any part thereof, for his life, or any yearly rent-charge to be issuing out of my said hereditaments, or any part thereof, and to be payable during his life, with such powers and remedies for securing the same rent-charge as are authorized to be created by the power of appointing jointures lastly hereinbefore contained; such appointed estate or yearly rent-charge to commence from the decease of the appointor; but no estate or yearly rent-charge to be appointed under this power shall take effect as an actual estate or charge, unless the appointor shall be, or afterwards become, entitled in possession to the said hereditaments, or would, if living, have been so

Power to female tenants for life to limit life estates or rent-charges to husbands.

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Power to
tenants for
life to charge
with portions
for younger
children.

entitled, under the limitations herein contained. I EMPOWER every tenant for life under the limitations herein contained, whether entitled in possession or not, by deed, revocable or irrevocable, to be executed in the presence of and attested by one or more witness or witnesses, or by will, to appoint (but without prejudice to any jointure, rent-charge or life estate, to be limited to the wife or husband of such tenant for life under any power hereinbefore contained) my said hereditaments, or any part thereof, to any trustee or trustees for any term of years, without impeachment of waste, upon proper trusts, and with and under proper powers and provisions for raising, otherwise than by sale, for the child or children of the tenant for life so appointing, other than an eldest or only child entitled to the inheritance of the said hereditaments under the limitations aforesaid, a portion not exceeding £ — for one child, or portions not exceeding in the whole £ — for two children, or £ — for three or more children, with maintenance not exceeding interest at the rate of four per cent. per annum on such portion or portions; but the term to be created as last aforesaid shall be subject to a proper proviso for cesser, and the trusts thereof shall not be capable of being executed, unless the appointor, or his or her issue, shall be, or shall afterwards become, entitled in possession to the said hereditaments under the limitations aforesaid; And if the said hereditaments would, by reason of the exercise of this power, be liable, at any one time, to the payment of a larger principal sum in the whole than £ — (including the portion or portions raiseable under the trusts of the said term of one thousand years), then the charge or charges posterior in point of title shall be wholly or partially suspended. PROVIDED ALWAYS that it shall be lawful for every person of full age for the time being entitled in possession as beneficial tenant for life, or as tenant in tail, under the limitations hereinbefore contained, and for [*third set of (two) trustees, for general purposes*], or the survivor of them, his executors or administrators, during the minority of any such tenant for life, or in tail, or in fee, in possession, from time to time by indenture executed by him, her or them in the presence of and attested by one or more witness or witnesses, to appoint, by way of lease, my said hereditaments hereinbefore devised, or any of them (except my capital mansion-house at —, and the out-

Power to
tenants for
life and
tenants in
tail to grant
leases.

buildings, garden and pleasure-grounds thereto belonging), for any term of years not exceeding twenty-one years in possession from the making of the lease, so as the best yearly rent, payable half-yearly or quarterly, be reserved, and no fine or premium be taken, and so as the lease contain covenants for payment of the rent and taxes, for repairing and keeping in repair the premises demised, and, if the lease comprise any buildings, for insuring the same against loss by fire, to the extent of at least two-thirds of the value thereof, with such other covenants as the lessor shall think reasonable, and also a proviso for re-entry on nonpayment of the rent for a period not exceeding forty days after the same shall become due, or on breach of any of the covenants, and so as the lessee execute a counterpart. I EMPOWER the said [*third set of trustees, for general purposes*], or the survivor of them, his executors or administrators, during the minority of any tenant for life, in tail, or in fee, entitled under the limitations hereinbefore contained to the present possession of or receipt of the income from all or any part of the said freehold hereditaments hereinbefore devised, to receive such income and to manage such hereditaments, to manage and settle accounts with tenants, to cut timber for repairs or sale, to insure, to pay all or any charges, either of annual or gross sums, and all other outgoings; and to apply all or part of the clear surplus income towards the maintenance and education of the person entitled thereto; And to invest the residue (if any) of such income in the manner hereinafter authorized with respect to the money to arise from the exercise of the powers of sale, exchange or partition, with power to resort to such accumulations for future maintenance or education. PROVIDED ALSO that it shall be lawful for the said [*third set of trustees, for general purposes*], or the survivor of them, his executors or administrators, with the consent in writing of the person for the time being entitled in possession as beneficial tenant for life or in tail under the limitations herein contained, or during the minority of any such person in the discretion of the same trustees or trustee, from time to time to sell my said hereditaments, or any part thereof (except my capital mansion-house and the outbuildings, garden and pleasure-grounds thereunto belonging), together or in parcels, by public sale or private

Power to
manage de-
vised here-
ditaments.

Maintenance.

Powers to
sell and ex-
change and
make parti-
tion.

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contract, or to exchange my said hereditaments, or any part thereof (except as aforesaid), for other hereditaments or tenements of the description hereinafter authorized to be purchased, or to make partition of any hereditaments whereof an undivided share or shares is or are hereby devised, with liberty to give or accept any sum or sums of money for equality of exchange or partition, and thereupon, by deed executed by the said [*same trustees*], or the survivor of them, his executors or administrators, in the presence of and attested by one or more witness or witnesses, to make such revocation of the uses of my will, and such appointment of new uses, as shall be proper for effecting the sale, exchange or partition (*d*). PROVIDED ALSO that it shall be lawful for

Powers to

23 & 24 Vict.
c. 145, Pt. I.
Power of sale
and ex-
change.

(*d*) By the 1st sect. of Lord *Cranworth's* Act (23 & 24 Vict. c. 145), it is enacted that "in all cases where by any will, deed or other instrument of settlement, it is expressly declared that trustees or other persons therein named or indicated shall have a power of sale, either generally or in any particular event, over any hereditaments named or referred to in, or from time to time subject to the uses or trusts of such will, deed, or other instrument," the trustees, whether the hereditaments be vested in them or not, may exercise such power of sale by selling either together or in lots, by auction or private contract, and at one time or at several times; and (in case the power shall expressly authorize an exchange) may exchange and give or receive any money for equality of exchange. By sect. 2, any such sale or exchange may be made under special stipulations as to title or evidence of title, and the trustees may buy in, and rescind or vary any contract and re-sell without being responsible for loss thereby occasioned; and no purchaser is to be bound to inquire whether the trustees have or have not in contemplation any particular re-investment of the purchase-money. By sect. 3, the trustees, for the purpose of completing the sale or exchange are empowered to convey the hereditaments; the purchase-money is to be laid out (sect. 4) in the manner indicated in that behalf in the instrument containing the power of sale or exchange, or if no such indication exists therein, then in the purchase of other lands to be held upon the same uses and trusts, or (sect. 5) in payment of incumbrances. The money arising from the sale or exchange is to be laid out, and the lands received in exchange are to be situate, in the country in which the lands sold or exchanged are situate (sect. 6); and until the purchase-money is disposed of as aforesaid, it is to be invested at interest (sect. 7). Money required for equality of exchange may be paid out of trust moneys in the hands of the trustees, or may be raised by mortgage (sect. 9); but no sale or exchange or purchase is to be made (sect. 10) without the consent of the

—
enfranchise
copyholds ;

the said [*third set of trustees, for general purposes*], or the survivor of them, his executors or administrators, with the consent in writing of the person for the time being entitled in possession as beneficial tenant for life or in tail under the limitations hereinbefore contained, or during the minority of any such person in the discretion of the same trustees or trustee, from time to time to enfranchise any copyhold hereditaments which shall be holden of any manor subject to the trusts hereof, and on such enfranchisement to regrant any commonable rights which may be thereby extinguished. AND from time to time, with such consent or in such discretion as aforesaid, to grant to any copyhold or customary tenant or tenants of any hereditaments holden of any manor subject to the trusts hereof, a licence in writing to build on or otherwise improve all or any part of his or their tenement, and to pull down any erections which shall be on such tenement, and to demise all or any part of his or their tenement for any term not exceeding [*twenty-one*] years (or for building purposes for any term not exceeding [*ninety-nine*] years), to commence from or within six calendar months after the time of granting such licence, or for any one or more of the purposes aforesaid. AND ALSO to fix the sum which during the term mentioned in such licence shall be considered as the annual value for assessing the fines payable to the lord upon admission of any

—and to
grant licences
to copy-
holders.

person appointed to consent by the will, deed, or other instrument, and if none such, then of the person entitled in possession to the receipt of the rents and profits, if he be not under disability.

23 & 24 Vict.
c. 145, Pt. I.

The sections above epitomized speak throughout of a “power of sale or exchange,” and do not seem to include the case of an imperative trust for sale. In the absence of authority on the point, it may be doubtful whether a trust for sale is within the Act, and it would be unsafe to rely upon the applicability of the statute in such a case. But with respect to powers of sale and exchange, there seems to be no sufficient reason why, in simple cases, the implied powers conferred by the statute should not be allowed to operate in substitution for the express powers, ancillary to the power of sale and exchange, which are ordinarily inserted. See the sections of the Act discussed and their provisions compared with the common form of a power of sale and exchange in a settlement of real estate, 3 Dav. Conv. by Waley, 460—469, 892—895. See also *Re Peyton's Settlement* (30 Be. 252), as to the power of trustees for sale (without specific authority) to fix a reserved bidding or do other acts usual and requisite to give effect to the power.

Whether a
trust for sale
is within the
Act.

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Application
of money
arising from
sale, &c.

new tenant to any tenement in regard to which such licence shall be granted, so that the sum to be fixed shall not be less than the best annual rent which at the date of such licence might be reasonably obtained on a demise of the premises, and for the term mentioned in such licence. PROVIDED always that no fine or premium be taken for making or granting any such licence, except the customary annual fine (if any) for every year of the said term, and such fees as shall be usual and reasonable in that behalf; and that upon the grant of every such licence there be reserved to the lord of the manor all fines, heriots, rents, customs and services due and to become due in respect of the tenement in regard to which such licence shall be granted, and that every such licence be entered on the court rolls or court books of the manor. AND I DECLARE that the said [*third set of trustees*], or the survivor of them, his executors or administrators, may apply the money to be received from any such sale, exchange or partition as aforesaid, in the first place, in discharging the incumbrances (if any) which shall then affect the hereditaments hereby limited in strict settlement, and shall lay out the money so received, and not so applied, in the purchase of freehold hereditaments in fee simple in possession, situate in England or Wales, or of copyhold or customary, or leasehold tenements (such leasehold tenements to be held under a renewable lease or leases for lives or for years, or for a term of years absolute whereof at least fifty years shall be unexpired), convenient to be held with the hereditaments hereby limited in strict settlement or to be acquired under this provision, and shall settle or cause to be settled, as well the hereditaments and tenements so to be purchased, as the hereditaments and tenements to be acquired by means of any such exchange or partition as aforesaid, to and upon such of the uses and trusts, and subject to such of the provisions herein limited or expressed concerning my freehold hereditaments hereinbefore devised as shall be subsisting, or as near thereto as may be; but so that the chattels real to be so settled shall be subject to an executory limitation over on the death of any tenant in tail by purchase of the said freehold hereditaments under the age of twenty-one years without leaving issue in tail living at his or her decease, to or in favour of the person or persons entitled under the subsequent limitations of the same

freehold hereditaments according to the tenour of the same limitations [*or*, shall settle or cause to be settled the estates so to be purchased, and the estates to be acquired by means of any such exchange or partition as aforesaid, conformably to the dispositions hereby made concerning my estates of the same or the like tenure hereby devised, so far as such dispositions shall be then capable of taking effect], and shall, until the same money shall be so laid out as aforesaid, invest the same in or upon the public stocks, funds or securities of the United Kingdom, or real securities in England or Wales (but not in or upon any other kind of investment), in the names or name of the said [*same trustees*], or the survivor of them, his executors or administrators, with power to vary the investment from time to time for any other or others of the like nature; AND I DECLARE that the income of such investments shall follow the dispositions to which the rents of the hereditaments directed to be purchased therewith would, if such purchase were made, be subject; BUT I DIRECT that no such purchase or investment as aforesaid shall be made while there shall be any person entitled as beneficial tenant for life or tenant in tail in possession under the limitations herein contained and of the age of twenty-one years, without the previous consent in writing of such person; AND inasmuch as the limitations hereinbefore contained concerning my freehold hereditaments are not in all respects the same, I DIRECT that distinct sales, exchanges, purchases and investments shall be made, so that the several estates or funds differently settled may be readily ascertainable. PROVIDED ALSO, that every person having a surname or arms different from the surname or arms hereinafter required to be used, who shall be entitled in possession as beneficial tenant for life or in tail under the limitations herein contained and not be a married woman, or who shall marry any female becoming so entitled otherwise than for her separate use, shall, as to every such tenant, within eighteen calendar months after he or she shall become entitled in possession, if of the age of twenty-one years, or, if not, within eighteen calendar months after attaining that age, and as to every such husband within eighteen calendar months after his wife shall become entitled in possession or be married to him, whichever shall last happen, assume and use, under the sanction of an Act of Parliament or licence from the

Interim investment.

Proviso requiring persons entitled under the limitations to take the testator's name and arms.

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— Crown, or otherwise, my surname of —, either alone or in addition to his or her usual surname (but so that the name of — shall be the last and principal name), also the arms of — quartered with his or her family arms, and shall thenceforth use the same surname and arms accordingly; And that every person excluded, by reason of his or her already bearing the surname and arms aforesaid, from the operation of the requisitions aforesaid, shall continue the use of such surname and arms; And that, in case of neglect or refusal (*e*)

Suggestions as to framing clauses in-joining the use of a name and arms, &c.

(*e*) The points chiefly to be attended to in framing clauses of this nature are:—*First*, to describe with explicitness and precision the act or event contemplated by the testator. For instance (by way of selecting a few examples of frequent occurrence), where a name is to be assumed, it should be shown whether the authority of the royal licence or an Act of Parliament is to be obtained, or the clause will be satisfied by an assumption of the name without any such sanction (Co. Litt. 3 a.; *Davies v. Lowndes*, 1 Bing. N. C. 618; 4 Id. 478, 5 Id. 161; *Leigh v. Leigh*, 15 Ves. 92); and whether a person who has previously so assumed it, is to be considered as exempt from an injunction which was imposed exclusively on persons not bearing the name (*Doe v. Yates*, 5 B. & Al. 544; *Hawkins v. Luscombe*, 2 Sw. 375). See also *Woodhouse v. Herrick* (1 K. & J. 352); *Langdale v. Briggs* (3 S. & G. 255; 4 W. R. 703); *Blagrove v. Bradshaw* (4 Drew. 230); *Re Catt's Trusts* (2 H. & M. 46). Where a testator prescribes the mode by which the name is to be assumed, of course no other mode may be substituted for it; but a royal licence or an Act of Parliament is not necessary for adopting a new surname; a voluntary assumption (if made for no fraudulent purpose) is sufficient (Falconer on Surnames; 3 Dav. Conv. by Waley, 280—284; 4 Id. p. 339); and in the absence of any express stipulation or requirement by the testator, it is apprehended that a person voluntarily assuming the name within a reasonable time satisfies the condition imposed on him, and that the words “bearing the surname” are satisfied by a *de facto* bearing of that name. See also, on clauses of this kind, Peachey on Settlements, 964; and, as to the custody of a deed of grant of arms from the Herald's College, see *Stubs v. Stubs* (1 H. & C. 257). Again, if the clause injoins residence, it ought to appear what length of continuous or occasional occupation is to be deemed sufficient. See *Dunne v. Dunne* (7 D. M. & G. 207); *Walcot v. Botfield* (Kay, 534); *Wynne v. Fletcher* (24 Be. 430); *Maclaren v. Stainton* (4 Jur., N. S. 199); *Rabbeth v. Squire* (4 De G. & J. 393); *Parker v. Parker* (1 N. R. 508). And if the object be to confine the appropriation of the property to the personal enjoyment of the devisee, the clause should be expressly extended to alienations by operation of law. *Secondly*, in cases where the act or event is of a recurring nature, and with reference to a series of limitations, and it is the intention of the framer of the instrument to subject the estate of every person taking under the limitations to the performance

Clause in-joining resi-
dence.

Conditions of
a recurring
nature.

to comply with all or any of the requisitions of this proviso, the estate or estates hereby limited for the life of the person,

of the act, or the happening of the event, such intention should be made very clear by express provision, lest it should be contended, that, by the act having been once performed, or the event having once happened, the persons taking under the later limitations are exempt from the consequences incident to the recurrence of the event, or to the non-performance by them of the act. In the *Earl of Scarborough's case* it was contended (though unsuccessfully) that the descent of the earldom and the shifting of the estate having once happened, the use for again shifting the estate on a second descent was nugatory, its power having been exhausted by one operation; much use was made of an argument derived from the different modes in which the clause imposing the necessity of taking the name and arms of the Savile family, and the clause shifting the estate on the descent of the earldom, were framed; the former having been framed so as clearly to injoin the necessity of complying with the clause *toties quoties*, the latter expressing that necessity with less clearness (*Earl of Scarborough v. Savile*, 3 A. & E. 2; *ib.* 897). *Thirdly*, it should be shown distinctly whether the prescribed act or event is to be in the nature of a condition precedent or a condition subsequent; in other words, whether the performance or happening is to precede the vesting, or the non-performance or non-happening is to divest an interest antecedently vested. *Fourthly*, it should be stated whether the whole duration of life, or any and what less period, is to be allowed for performance, and whether any and what notice is to be given to the devisee. The rule as to notice is, that, where the devisee on whom the condition is imposed is the testator's heir, the devisee over is bound to apprise him of the condition, but not otherwise (*Doe v. Beauclerk*, 11 Ea. 657, 662). *Fifthly*, the clause should point out the precise destination of the property in the event of non-compliance, showing clearly, if there are remainders limited to the issue of the offending party, whether they are or are not to be involved in the forfeiture. *Sixthly*, if the clause is of a nature to require the concurrence of a third person, as, for instance, marrying with consent, &c., or living in the service of another, &c.: then it ought to be shown what is to be the result of compliance becoming impracticable by the death or lunacy of such third person. No one acquainted with our Reports will require to be informed that questions such as these have been productive of much litigation.

No precise form of expression is required to attach conditions to the enjoyment of gifts conferred by will: any words which show the intention of the testator are sufficient for the purpose. The difficulty, generally, is to determine whether the condition is intended to be precedent or subsequent; in other words, whether the condition is to be fulfilled before any estate vests in the donee, or the non-fulfilment of the condition is to cause the determination of an estate previously vested: whether, in fact, the condition is imposed on the acquisition of the property, or only on its reten-

Conditions,
recurring.

Conditions
precedent or
subsequent.

Time allowed
for perform-
ance of condi-
tion.

Destination
of property,
if no com-
pliance.

Compliance
impossible.

Conditions.

Precedent or
subsequent.

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or, as the case may be, the estate tail hereby limited to the person or ancestor of the person, who or whose husband shall

tion. See instances of conditions precedent and subsequent collected in 2 Jarm. Wills, ch. 27.

Impossibility
of condition
attached to
reality,

As regards real estate, when a condition precedent cannot be fulfilled, owing to its actual impossibility or its illegality, the estate fails: but if a condition subsequent become impossible or is illegal, the estate is absolute. (But see 2 Jarm. Wills, 10, and *post*, p. 397, as to the case where there is a gift over on non-performance of the condition.)

—and per-
sonalty.

As regards personal estate, no distinction is recognized between a precedent and subsequent condition. Where a condition attached to a legacy is impossible, the general rule is, that the gift vests absolutely and unconditionally; subject, however, to exceptions in the cases, (1) where the fulfilment of the condition is the sole motive of the gift, (2) where the impossibility was not known to the testator when he imposed the condition, and (3) where the condition, originally possible, has become impossible by the act of God. If the condition be void by reason of its involving a *malum prohibitum*, the bequest is absolute; but if the condition involve a *malum in se*, the gift itself is void.

Contingent
gift subject
to condition.

That a contingent gift or interest has a real existence, and is capable, as much as a vested estate or interest, of being operated upon by a condition subsequent, and of being made to cease and become void, see *Egerton v. Brownlow* (4 H. L. C. 1).

Repugnant
conditions.

Conditions or restraints inconsistent with and repugnant to estates or interests to which they are annexed are absolutely void. Thus, where there is an absolute devise or bequest of real or personal property, followed by a gift over in the event of the donee dying intestate, the gift over is repugnant, and consequently void (*Barton v. Barton*, 3 K. & J. 512; *Holmes v. Godson*, 8 D. M. & G. 152; *Gulliver v. Vaux*, Ib. 167, n.; *Weale v. Olive*, 32 Be. 421). See *Bradley v. Peixoto* and the notes thereto in Tnd. L. C. R. P. 858—875.

As to condi-
tions imposed
on tenants in
tail.

In various points of view it is important that conditions precedent and subsequent should be accurately distinguished. In regard to estates tail, the efficiency of the restriction depends entirely on the distinction; for, if it is subsequent, the devisee may, at any time before the actual divesting of the estate, defeat the limitation over by an inrolled conveyance (now substituted for a common recovery), which would have the effect of destroying all executory limitations ulterior to and engrafted on the estate tail (*Robinson v. Comyns*, Ca. t. Talb. 165; *Gulliver v. Ashby*, 4 Bur. 1929; 1 W. Bl. 607; *Doe v. Beaucherk*, 11 Ea. 657; *Monypenny v. Dering*, 2 D. M. & G. 145. And see Butler's *Fearne*, 254, c). An estate tail, therefore, to which a conditional limitation is intended to be annexed, ought, when possible, to be so framed, that it shall not vest in the devisee until performance; and if it be meant that the devisee in tail shall have the enjoyment of the lands antecedently to the performance of the condition, a

be guilty of such neglect or refusal, shall cease, and the subsequent limitations be accelerated, yet so that if all or any of the

precedent estate for years should be carved out, determinable on performance, or at the expiration of the period within which only performance can occur.

Where the condition which is to precede the vesting of an estate is of a nature to require for its performance the co-operation of a third person, the mere performance by the devisee of his part of the condition will not give effect to the devise, since a testator may, if he chooses, give one person an estate in case another does a certain act, and not otherwise; and, if he has so intimated his intention, nothing less than a full compliance with the prescribed condition can entitle the devisee. Thus, if lands are devised to A. in fee when he shall attain the age of twenty-one years, in case, before that event, he shall marry B., although B. should die in childhood, or marry Z., or refuse to marry A. after overtures from him, the estate nevertheless would not vest (*Lord Falkland v. Bertie*, 2 Ver. 333; 1 Salk. 231; *Roundel v. Curren*, 2 Br. C. 67). On the other hand, if lands were devised to A. in fee, with a proviso, that, unless A. before the age of twenty-one should marry B., then his estate should cease; if the marriage were prevented by the means before suggested, A.'s estate would become absolute (*Thomas v. Howell*, 1 Salk. 170; *Aislabie v. Rice*, 3 Mad. 256). So, if the condition were, that the devisee should dispose of part of the lands for an illegal purpose, as to a charity, the condition (which is necessarily subsequent, since its performance requires that the devisee should have the estate) would be void and the estate absolute (*Poor v. Mial*, 6 Mad. 32; *Ridgway v. Woodhouse*, 7 Be. 437; see also *Wright v. Wilkin*, 2 B. & S. 232). And where a legacy was given to a married woman, upon condition that she, within twelve months, conveyed an estate held by her for her separate use, with a clause against anticipation, it was held, that the Court had no power to interfere with this prohibition, for the purpose of enabling the married woman to comply with the condition, and the legacy therefore failed (*Robinson v. Wheelwright*, 6 D. M. & G. 535).

It should seem that the doctrine stated to be applicable to conditions subsequent becoming impossible to be performed, does not obtain where the estate is devised over on non-performance; in which case to hold that the estate of the first devisee had become absolute, would be to adjudge that the estate of the second and substituted devisee had failed, notwithstanding the happening of the event on which it was expressly given, which seems to be an unfair and unauthorized interference with the rights of the respective objects of the testator's bounty, and an undue curtailment of the testamentary power.

Hence has arisen the important difference, existing in many instances, between the effect of a condition which is accompanied by a devise or bequest over, and one that is not so accompanied. Thus, it is clear that where real or personal estate is given to a person in case he shall execute a

Condition precedent requiring co-operation of others.

Where estate is devised over on non-performance.

Effect of a gift over, on breach of a condition.

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uses limited to the issue of a tenant for life whose estate shall so cease shall be contingent, a limitation to the use of the said

Condition,
gift over on
non-com-
pliance.

release, or shall not dispute the will, or shall do or decline to do any other prescribed act, and in default the property is given over, such ulterior devise or bequest will take effect, whatever may be the nature of the property, or of the act which is enjoined or prohibited. (See *Cleaver v. Spurling*, 2 P. W. 526; *Simpson v. Vickers*, 14 Ves. 341; *Tulk v. Houlditch*, 1 V. & B. 248; *Burgess v. Robinson*, 1 Mad. 172, 3 Mer. 7; *Cooke v. Turner*, 14 Sim. 493; *Cooke v. Cholmondeley*, 2 M. & G. 18; *Re Dickson's Trust*, 1 Sim., N. S. 37; *Davis v. Angel*, 31 Be. 223, 10 W. R. 722).

Equitable
relief against
forfeiture,
when there is
no gift over.

Where there is no devise or bequest over, and the condition is of a nature to admit of compensation being made, equity will, on subsequent performance, relieve against a forfeiture incurred. Where lands of inheritance are given upon condition that the devisee pay a sum of money within a definite period, and, the money not being paid, the heir enters for a breach of the condition, a Court of Equity will, notwithstanding the lapse of the prescribed period of performance, restore the estate to the devisee upon payment of principal, interest and costs (*Salmon v. Vaux*, Toth. 105; *Underwood v. Swain*, 1 Rep. Ch. 161; *Barnardiston v. Fane*, 2 Ver. 366; *Grimston v. Lord Bruce*, 1 Salk. 156, 2 Ver. 594; see also *Wallis v. Crimes*, 1 Ch. Cas. 89). And this species of relief has been extended to cases less palpably admitting of after-satisfaction, as in *Cage v. Russel* (2 Ven. 352), where a testatrix had devised lands to her executors to pay 500*l.* out of them to her son at the age of twenty-one, provided that, if his father did not execute a certain release to the executors, then the gift of the 500*l.* to the son should be void, and the money should go to the executors; a release was tendered to the father (see *Williams v. Knipe*, 5 Be. 273, as to the proper course to pursue), who refused to execute it, but he afterwards offering to do so, the legacy was decreed to be paid to the son; the Lord Chancellor distinguishing this case from a condition requiring marriage with consent, which did not admit of after-satisfaction.

In *Cage v. Russel* no time was prescribed by the testator for the execution of the release, but, according to subsequent cases, even this circumstance would not have excluded equitable relief. Thus, in *Taylor v. Popham* (1 Br. C. 168), a testator gave to A. an annuity of 600*l.* on condition that he should, within three months, execute a release of all demands on the testator's estate; the residuary legatee filed a bill against the annuitant, alleging that a release had been tendered and refused, and insisting that the annuity was forfeited; the annuitant, on the other hand, insisted on his right to release at any time. Lord Thurlow declared the rule to be, that, if the Court can put the parties in the same situation as if the condition had been performed, it will never suffer a forfeiture to attach; he considered that the release which had been tendered had been properly refused, as it extended to other annuities given by the testator to the legatee, which ought not to have been included: it was, therefore, referred to the Master

[*third set of trustees, for general purposes*], their executors and administrators, for the life of such tenant, shall spring up and

to prepare a proper release, which was done; but the legatee still refusing to execute it, a decree was made absolutely excluding him from the annuity of 600*l*. In this case the absence of an express bequest over was not the avowed ground of determination, but it formed that of the next two cases. Thus, in *Simpson v. Vickers* (14 Ves. 341), a testator bequeathed 1,000*l*., to be paid within six calendar months after his decease, to his brother M., upon his then executing to the executrix a release of all claims and demands; and if he refused or declined to do so, the testator revoked the bequest, appointing his sister E. sole executrix: M. did not give the release within the time prescribed; and yet he was held to be entitled to the legacy, upon his subsequently releasing all demands. So, in *Hollinrake v. Lister* (1 Rus. 500), where a testator forgave to a debtor all his demands, on condition that within two months after his decease he signed a release of all his claims to the property which the testator had given to the debtor's wife; and the testator directed his executors to release the debtor if he signed such release, but not otherwise; no release was executed by the debtor, a doubt being raised whether it ought to be made in favour of his wife or of the testator's estate. Lord *Gifford*, M. R., was of opinion that the release should be in favour of the wife; and, on the authority of *Taylor v. Popham* (*ubi sup.*), held, that, as the condition was not accompanied by a bequest over in default, the Court would relieve against the forfeiture. The executors, therefore, were decreed to execute to the debtor a release from the testator's demands on his making a settlement in favour of his wife of the estate in question.

Conditions,
equitable re-
lief.

If the devisee's or legatee's title to equitable relief is to depend simply on the fact of the absence of a devise or bequest over, the question is reduced within a very narrow compass; it would merely be necessary to ascertain what amounted to such a devise or bequest; in reference to which it is to be observed, that, although in *Cage v. Russel* (*ante*, p. 398), it appears to have been considered that a direction that a sum of money, which was to be raised by the executors, should, on breach of the condition, go to the executors, was not a bequest over, because no more than the law implied; yet in more recent cases a direction that the legacy shall fall into the residue has been treated as having the operation of an express bequest over (*Wheeler v. Bingham*, 3 Atk. 364; *Lloyd v. Branton*, 3 Mer. 108). It is clear, however, that a devise or bequest over will not be supplied in order to render a condition effective. Therefore, where a testator had devised a certain estate to A. for life; remainder to the heirs male of the body of B.; remainder to the heirs male of the body of C.; adding a proviso and condition, that the persons to whom the estate should come should then change their names and take the testator's: one of the points decided was, that this condition, which was held to be a condition subsequent, conferred on the devisee in remainder no title to enter on the

What
amounts to a
gift over.

Gift over
will not be
supplied.

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immediately precede the use or uses from time to time in contingency, UPON TRUST to preserve the same, but to permit the rents and profits to be received and enjoyed by the person or persons from time to time entitled to the first vested remainder for the time being therein (*f*). AND I DECLARE that, on the

Conditions,
equitable
relief.

breach, there being no express devise over in that event (*Gulliver v. Ashby*, 1 W. Bl. 607; 4 Bur. 1929). After all, however, legatees must not presume too confidently on their licence to disregard conditions which are not enforced by a bequest over; since the cases do not very precisely define the limits of the doctrine.

Cases in
which equity
exact a
strict com-
pliance with
conditions.

Probably the Courts would distinguish between a condition whose performance is in the nature of a personal qualification, such as that of preferring a claim in a prescribed manner or time, and one involving a collateral act admitting of after-performance, such as the execution of a release. Such a distinction is suggested by *Tulk v. Houlditch* (1 V. & B. 248, 259), and *Burgess v. Robinson* (1 Mad. 172, 3 Mer. 7), where, though there were express bequests over, yet the decisions appear to have been made on grounds independent of this fact, and which seem to countenance the distinction in question. See also *Doe v. Lakeman* (2 B. & Ad. 30); *Woods v. Townley* (11 Ha. 319); *Priestley v. Holgate* (3 K. & J. 286); *Re Arrowsmith's Trusts* (2 D. F. & J. 474). It ought to be observed, that, in the case of *Simpson v. Vickers* (*ante*, p. 399), where an estate was held to be irrevocably fixed in an executory devisee on the default of a prior devisee to execute a release within the prescribed time, it was contended, on the authority of *The Earl of Northumberland v. The Earl of Aylesford* (Amb. 540), that the devisee, by entering into possession of the devised estate, had, according to the doctrine of election, bound himself to execute, and was therefore to be considered as having executed, the release; but Sir *W. Grant* considered that, as the devisee was heir, and entered in that character, contesting the will, the case did not apply; besides which, he was of opinion that its authority was shaken by *Lord Beaulieu v. Lord Cardigan* (Amb. 533, *S. C. nom. Duke of Montague v. Lord Beaulieu*, 3 Br. P. 277), where the House of Lords, reversing a decree of Lord *Northington* made upon grounds similar to those of the former case, held, that a devise over, which was limited to arise on the previous devisee not suffering a common recovery, within a defined period, of certain estates, of which he was tenant in tail, to prescribed uses, took effect, on account of the devisee's non-compliance with the condition.

Name and
arms clause,
its operation
in a given
case.

(*f*) Thus, if the estate stood limited to A. for life, remainder to B., his first son, in tail, with remainder to trustees for A.'s life to preserve contingent remainders, with remainder to the unborn sons of A. successively in tail, remainder to C. for life, &c., and the life estate of A. determined under the proviso, the lands would, by force of the proviso, become limited to B. in tail, remainder to trustees during the life of A. to preserve contingent remainders, remainder to the unborn sons successively in tail, remainder to

cessor of the estate of a female tenant for life, whose husband shall so neglect or refuse as aforesaid, any appointment or appointments of a life estate or rent-charge made or to be made by her in his favour, in exercise of the power hereinbefore given to her, shall be void. I DEVISE the copyhold tenements and hereditaments to which I may be entitled at my decease to such of the uses and subject to such of the provisions hereinbefore contained concerning my freehold hereditaments hereinbefore devised, as are posterior to the limitation of the said term of five hundred years, except the clause declaring life estates to be unimpeachable for waste, and subject to a prohibition against exercising the power of leasing without licence of the lord. [Or, I DEVISE my copyhold tenements and hereditaments TO THE USE of the said (*third set of trustees, for general purposes*), their heirs and assigns, upon such trusts, and subject to such provisions, as shall correspond, as nearly as the difference of tenure will permit, with the uses and provisions hereinbefore contained concerning my freehold hereditaments hereinbefore devised posterior to the limitation of the said term of five hundred years.] I DEVISE AND BEQUEATH the leasehold tenements to which I may be entitled at my decease, whether held for lives or for years, absolute or determinable (*g*), unto the said

Devise of copyhold estates by reference to the limitations of the freehold estates.

[Another form.]

Devise of leasehold estates for lives and years to trustees, to

C., &c.; and if B. were to die in the lifetime of A., and before the birth of another son of A., without issue and without barring the remainders, the rents would be payable to C., as the next vested remainderman, during the suspense of the contingent remainders to the unborn sons of A. It seems proper that the legal freehold of the trustees should be postponed to the vested estate tail of B., and "immediately precede" the contingent remainders to be supported, though in general it is made to over-ride all the remainders to the issue of the tenant for life, whether vested or contingent.

Name and arms clause.

(*g*) By the 8th section of Lord *Cranworth's* Act, 23 & 24 Vict. c. 145, it is enacted, that "it shall be lawful for any trustees of any leaseholds for lives or years which are renewable from time to time, either under any covenant or contract or by custom or usual practice, if they shall in their discretion think fit, and it shall be the duty of such trustees, if thereunto required by any person having any beneficial interest, present or future or contingent, in such leaseholds, to use their best endeavours to obtain from time to time a renewed lease of the same hereditaments on the accustomed and reasonable terms, and for that purpose it shall be lawful for any such trustees from time to time to make or concur in making such surrender of the lease for the time being subsisting, and to do all such other acts as

23 & 24 Vict. c. 145, ss. 8, 9.
Renewal of leases.

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he enjoyed
(subject to
payment of
the reserved
rents, &c.,
and the re-
newal of the
leases) ac-
cording to
the limita-
tions of the
freeholds.

[*third set of trustees, for general purposes*], their executors, administrators and assigns, UPON TRUST, out of the rents and profits thereof, or by raising money on mortgage thereof, to pay the rents and perform the covenants subject to which the same tenements are respectively held, and to renew, at the usual periods, the leases of such of the same tenements as shall be or have been held under leases usually renewed; And, subject thereto, UPON TRUST to permit the same tenements to be enjoyed, as nearly as the difference of tenure will allow, according to the limitations and provisions hereinbefore contained concerning my freehold estates hereinbefore devised, posterior to the limitation of the said term of five hundred years, but so that my leasehold tenements held for years shall be subject to an executory limitation over on the death of any tenant in tail by purchase of my freehold hereditaments under the age of twenty-one years, without leaving issue in tail living at his or her death, to or in favour of the person or persons entitled under the subsequent limitations, according to the tenour of such limitations (*h*). I DIRECT that the library of books, with the book

Plate, pic-

Renewal of
leases.

23 & 24 Vict.
c. 145.

The Act does
not extend to
copyholds for
lives.

Heirlooms;
chattels to go
with free-
holds; vest-
ing clause.

shall be requisite in that behalf: but this section is not to apply to any case where, by the terms of the settlement or will the person in possession for his life or other limited interest is entitled to enjoy the same without any obligation to renew the lease or to contribute to the expense of renewing the same." And by the 9th section, the persons effecting the renewal are authorized to pay any money required therefor out of the trust moneys in their hands, or to raise the same by mortgage of the hereditaments contained in the renewed lease, or of any other hereditaments for the time being subject to the subsisting uses or trusts to which the hereditaments comprised in the renewed lease shall be subject.

This power is confined to leaseholds and does not extend to copyholds for lives, as is generally the case with the corresponding clause inserted in settlements. See also the sections criticised, with reference to the mode in which the expense of renewal is to be borne, in 3 Dav. Conv. by Waley, 512—514; the conclusion arrived at by the learned author is that, "on the whole, the renewal clauses in the Act are less satisfactory and less clear in their operation than those which it has been the practice to insert in settlements."

(*h*) The form commonly used merely provides negatively that the chattels real shall not vest absolutely in a tenant in tail, unless he shall attain twenty-one or die under that age leaving issue in tail; but it seems more correct to divest and limit them over in express terms on that event (see *Rowland v. Morgan*, 2 Ph. 764). In that case it was held that a

cases and appendages, the pictures and framed prints, and the statues, marbles, bronzes and other articles of *vertu* which shall

tures, &c., to be enjoyed as heirlooms,

Heirlooms.

direction annexed to a bequest of chattels that they shall go as heirlooms, does not render such bequest executory, or give an Equity Court any power to modify the legal effect of the bequest, whatever that may be. It seems to be established, *first*, that an assignment or bequest of personalty, either immediate or by way of trust executed, to go according to the limitations of real estate, vests it absolutely in the first tenant in tail immediately upon his birth (*i. e.* the first tenant in tail whose estate is indefeasible, and not a tenant in tail whose estate, though vested, is defeasible by the coming into existence of a person entitled, under the will, to an estate prior to his, *Hogg v. Jones*, 32 Be. 45), and this, whether the limitations of the personalty be expressed *in extenso*, or created by reference to the limitations of the real estate. Such reference may be effectually made, either by expressly saying that the chattels are to go on the same uses as the real estate, or by declaring that they are to be treated as heirlooms. *Secondly*, the addition of the words "so far as the rules of law and equity will permit," and the circumstance also of the legal interest being left in executors or trustees, will not prevail in any way to alter the general rule, or to render, in other words, the trust executory instead of executed (*Vaughan v. Burslem*, 3 Br. C. 101; *Gosling v. Gosling*, L. R., 1 H. L. 279). *Thirdly*, where the trusts are executory, there has been considerable difference of opinion: if the law can be considered as finally settled by authority, it is in favour of a construction which would introduce particular conditions, such as the attainment of twenty-one, into the limitations (*Countess of Lincoln v. Duke of Newcastle*, 12 Ves. 218); and see *Shelley v. Shelley* (L. R., 6 Eq. 540). *Fourthly*, doubtful words tending to restrict the interest in the chattels to those who come into possession of the real estate will not overrule the previous canons of construction, or have the effect of suspending the interest until the time when possession of the realty is obtained (*Foley v. Burnell*, 1 Br. C. 274; *Re Johnson's Trusts*, L. R., 2 Eq. 716). See the elaborate judgments of Sir W. Page Wood, V.-C., in *Lord Scarsdale v. Curzon* (1 J. & H. 40); *Viscount Holmesdale v. West* (L. R., 3 Eq. 474). And in order to deprive a tenant in tail of the chattels to which, on coming into the actual possession of the real estate under the limitations of the will, he would, according to the above rules, be entitled, it is necessary that his exclusion from possession of the realty should arise from some act or disposition of the testator, and not from any foreign circumstance (such as the execution of a disentailing deed) over which the testator had not and could not have control (*Hogg v. Jones*, 32 Be. 45).

As to the necessity for a limitation over on the death of any tenant in tail "by purchase," see 1 Jarm. Wills, 254, 2 Ib. 548, 3 Dav. Conv. by Waley, 497. In *Gosling v. Gosling* personal estate was bequeathed to trustees to be held upon the trusts declared of real estate strictly settled, with a proviso that the personalty should "not vest absolutely in any tenant

Gift over on death of tenant in tail "by purchase;"

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—
and an inven-
tory taken.

be in or about or belonging to my mansion-house of — at my decease, and all my plate and jewels there and elsewhere, shall be annexed to the same mansion-house as heirlooms, to be enjoyed by the person or persons for the time being beneficially entitled to the same mansion-house under the limitations hereinbefore contained, but so that such heirlooms shall be subject to an executory limitation over on the death of each tenant in tail by purchase under the age of twenty-one years, without leaving issue in tail living at his or her death, to or in favour of

Heirlooms.

in tail, unless such person should attain the age of twenty-one years;" the Master of the Rolls held (32 Be. 58), that the proviso was an integral part of the gift; consequently that the limitation was in substance to the first tenant in tail (whether by purchase or descent) who should attain twenty-one, and therefore was void for remoteness; his Honour also held, that the bequest was not an executory trust. But this decision was reversed by Lord Westbury (1 D. J. & S. 1), on the ground that the "tenant in tail" in the proviso necessarily referred to a tenant in tail of the realty, who would, under the trust by reference, also take the personalty, and therefore, as the personalty could not descend, the "tenant in tail" of the proviso was, on the context, to be read and construed as "tenant in tail by purchase." This decision was affirmed by the House of Lords (L. R., 1 H. L. 279), but depending as it did on the special terms and dispositions of the particular will, is (it need scarcely be mentioned) not to be regarded as an authority for the general omission of the express restriction to tenants in tail "by purchase." See also 4 Dav. Conv. by Waley, 379; *Harrington v. Harrington* (L. R., 3 Ch. 564); *Holloway v. Webber* (6 Eq. 523).

—under 21,
"without
leaving issue
in tail."

It will be observed that, in the text, the chattels real (pp. 392, 402) and heirlooms (p. 404) are made subject to an executory limitation over on the death of tenant in tail by purchase under the age of twenty-one years, "without leaving issue in tail living at his or her death;" if the tenant in tail dies under twenty-one, leaving issue in tail, the executory gift over does not take effect, and (the tenant in tail necessarily dying intestate) the chattels become the property of his next of kin. On the other hand, if the limitation over be on the death of tenant in tail under the age of twenty-one simply, and he (as above supposed) dies under that age leaving issue in tail, then the executory gift takes effect in favour of such issue, and the chattels real and heirlooms are kept in union with the freeholds for one step or generation further. If, therefore, the object be to make the personalty devolve with the freeholds as far as possible, the words "without leaving issue in tail living at his or her death" should be omitted; see 2 Jarm. Wills, 548, n. (e); 3 Dav. Conv. by Waley, 497; 1 Pow. Dev. by Jarm. 728—732.

As to what chattels were included in a bequest of heirlooms, see *D'Eyncourt v. Gregory* (L. R., 3 Eq. 382).

the person or persons entitled under the subsequent limitations, according to the tenour of such limitations: AND I DIRECT that my executors shall, within one calendar month after my decease, cause an inventory to be made of the said heirlooms, and place a copy of such inventory, signed by them and by the person then entitled to the enjoyment of the said heirlooms, among the muniments of title to my said mansion-house, to be kept therein, and deliver another copy so signed to the said [*third set of trustees for general purposes*], or the survivor of them, his executors or administrators, to be kept by them or him. I DECLARE that it shall be lawful for the said [*third set of trustees for general purposes*], or the survivor of them, his executors or administrators, with the consent in writing of the person or persons for the time being beneficially entitled to the same mansion-house as aforesaid, to exchange for others, or absolutely to sell and dispose of, all or any of the said heirlooms, and to employ the moneys to arise from any such sale or sales in the purchase (with the like consent) of any new or other article or articles of a similar nature and description, to be subject, together with those taken in exchange, to the same directions as are herein expressed concerning the said heirlooms.

Power to sell and exchange heirlooms.

I DECLARE that my wife shall be at liberty to reside in my mansion-house of — for six calendar months after my decease, and that, whether she shall reside therein or not, my executors shall keep up my establishment there for that period, upon the same scale and in the same mode as it had been usually maintained in my lifetime, and defray the housekeeping expenses, servants' wages, taxes and all other incidental outgoings, out of my personal estate. I BEQUEATH my carriages, carriage and saddle horses, with the harness and accoutrements belonging thereto, wines, liquors, fuel, housekeeping stores and provisions, household furniture, linen, china, brewing utensils, and other household effects belonging to me at my decease (except the articles hereinbefore constituted heirlooms), to my said wife absolutely, but subject to be used and consumed by my executors in keeping up my establishment as aforesaid. I BEQUEATH the residue of the personal estate to which I may be entitled at my decease unto the said [*third set of trustees for general purposes*], their executors and administrators, UPON TRUST TO

Permission to wife to reside in mansion-house for six months: executors to keep up the establishment for that period.

Bequest to wife of carriages, &c.

Residue of personal estate subjected to the same dispositions as the produce of

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—
estates sold
under the
power of sale.

Power to
postpone the
conversion of
personalty.

Power for
trustees to
complete a
contract,
without re-
quiring a
marketable
title;

—If contract
be aban-
doned, the
money to be
laid out in
another
purchase.

Devise of
trust and
mortgage
estates.

convert, collect and get in the same, and to dispose of the moneys to arise therefrom in manner hereinbefore directed concerning the moneys to arise from the sales to be made under the power of sale hereinbefore contained. I AUTHORIZE the trustees or trustee for the time being of such residue to permit the same, or any part thereof, to remain outstanding upon securities or otherwise, for such period as they or he shall think fit. I DECLARE that the yearly produce of my residuary personal estate for the time being outstanding (whether such produce be more or less than such estate, if invested pursuant to the trust aforesaid, would have yielded) shall be deemed the income thereof, and be applied, as such, conformably to the destination of the rents of the estates directed to be purchased by means of residuary estates. I DECLARE that, if the contract which I have entered into, dated the — day of — instant, for the purchase of a freehold estate in the parish of —, in the county of —, shall not be completed in my lifetime, my said trustees [*third set of trustees, for general purposes*], or the survivor of them, his executors or administrators, shall have full discretionary power to carry the same into effect, if they or he shall deem it expedient to do so, although the title to the said estate shall not be strictly marketable; [AND, in case the said contract shall be vacated on account of a defect of title or otherwise, then I DIRECT my same trustees or trustee to invest a sum of money, equal to the amount of the purchase-money, in the purchase of freehold lands to be settled to the uses and upon the trusts by this my will declared concerning my real estate; and until such purchase shall be made, the said moneys, or such part thereof as shall not be so laid out, shall be invested by my same trustees or trustee in government or real securities (but not in any other kind of security), and the dividends or interest of such investment shall be paid to the persons who would be entitled to the rents and profits of the land to be so purchased (i).] I GIVE to the said [*first set of trustees, who are afterwards appointed executors*], their heirs, executors and administrators, all the real estates vested in me as trus-

(i) This clause is applicable only where the real and personal estates are intended to go in different directions.

tee (*h*) or mortgagee in fee or otherwise, subject to the trusts and equities affecting the same respectively. PROVIDED ALWAYS, that the receipts of the respective trustees for the time being acting in the execution of the respective trusts hereinbefore created shall be discharges for all moneys to be received by them respectively pursuant to such trusts, and shall exonerate the person or persons paying the same from all liability in respect of the application thereof. PROVIDED ALSO, that in case any of the said trustees of this my will shall die in my lifetime, or shall refuse the trusts, or in case any trustee for the time being shall die or become unable, unfit or desire to retire from the office, then I EMPOWER the surviving or continuing trustees or trustee of the same class (*l*) or set of trustees, or, if there shall be none such, then the refusing or retiring trustees or trustee, if willing to act in the execution of this power, or if also none such, then the proving executors or executor for the time being, or the administrators or administrator for the time being of the deceased trustee, or if there shall

Receipts of trustees to be discharges.

Power of appointing new trustees.

(*h*) By the operation of the 33rd section of 1 Vict. c. 26 (*ante*, p. 56), a devise of trust estates may eventually include property which never actually vested in the testator himself. For instance, suppose A. to devise Black-acre to his son B. in fee, upon trusts, and B. to die in the lifetime of A., leaving issue who survive A. If B. left a will made since 1837, containing a devise of trust estates, such devise would pass the legal estate in Black-acre, though it had never become actually vested in B. In the preceding remarks it is assumed that the 33rd section of the Wills Act applies as well to estates vested in a testator as trustee, as to those of which he is beneficial owner. The terms of the enactment might seem to render this unquestionable, though the point has been doubted. It may be true, that property belonging to the testator beneficially was more immediately in the contemplation of the framer of the clause; but, as the language clearly is sufficient to comprise property of this description, and no inconvenience results from such a construction, there seems no reason why full scope should not be given to the enactment, according to the ordinary import of the words in which it is expressed. Some practical inconvenience, indeed, would occasionally arise from holding that, under a devise to a descendant of the testator upon trusts, a lapse occurred in regard to the legal estate and not as to the beneficial ownership, as in cases where a trustee is himself partially interested in the property. It would be necessary to determine the extent of his beneficial interest (often a difficult point) before the fact and extent of the lapse could be ascertained.

As to lapse of devises of trust estates.

Sect. 33 of Wills Act applies to trust estates.

(*l*) As to the application of 23 & 24 Vict. c. 145, s. 27, to a will containing several sets of trustees, see *ante*, pp. 129, 130.

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Appointment
of executors.

Direction
that one of
the trustees
and executors
shall act and
charge as
solicitor to
the estate.

be more than one such trustee, then the proving executors or executor for the time being, or the administrators or administrator for the time being of the last surviving of such deceased trustees, by any deed in writing, to appoint any person or persons in the room of such deceased, refusing, incompetent, unfit or retiring trustee or trustees, and every trustee so appointed as aforesaid, or by a court of competent jurisdiction, shall be fully competent to exercise all the powers and discretions which are reposed in the trustees of the same class or set hereby named. I APPOINT the said [*first set of trustees—of 500 years' term*] to be executors of this my will; and I also appoint them, and my said wife, to be guardians and guardian of the persons and fortunes of such of my children as at the time of my decease shall be under the age of twenty-one years. AND, it being my desire that the said [*name*], who is my attorney and solicitor, shall continue to act as such in all matters relating to my property and affairs, and shall make the usual professional charges, I EXPRESSLY DIRECT that he shall, notwithstanding his acceptance of the office of trustee and executor of my said will, and his acting in the execution thereof, be entitled to make the same professional charges, and to receive the same pecuniary emoluments and remuneration for all business done by him, and all attendances, time and trouble given or bestowed by him in or about the execution of the trusts and powers of my said will, or the management and administration of my trust estate, real or personal, as if he, not being himself a trustee or executor of my said will, were employed by the trustees or executors thereof, as attorney and solicitor to such trustees or executors, and shall be entitled to retain out of my trust moneys, or to be allowed and to receive from his co-trustees (if any) out of the same moneys, the full amount of such charges, any rule of equity to the contrary notwithstanding (*m*); nevertheless, without prejudice to the right or competency of the said [*name*] to exercise the authority, control, judgment and discretion of a trustee of my will. LASTLY, I REVOKE all former wills, and declare this only to be my last will and testament. IN WITNESS, &c.

(*m*) See note (*g*), *ante*, p. 318.

No. XXV.

WILL devising Estates to the Uses of a strict Settlement made upon the Testator's Marriage.

THIS IS THE LAST WILL AND TESTAMENT of me, [*testator's name, &c.*] WHEREAS, by the settlement made in contemplation of my marriage with my wife [*name*], by indentures of lease and release, bearing date respectively, &c., divers hereditaments therein described were settled by me to the use of myself for life, with remainder to the use of trustees and their heirs, during my life, to preserve contingent remainders; with remainder (subject to limitations for securing a jointure rent-charge to my wife, if she should survive me, for her life, and to a term of five hundred years for raising portions for our younger children,) to the first and other sons of our marriage successively in tail male; with remainders over; Which settlement contains divers powers and provisions concerning the said hereditaments: NOW I DO HEREBY DEVISE AND SUBJECT all the hereditaments of which I am or shall at the time of my death be competent to dispose, with the appurtenances, To such of the uses, trusts, powers and provisions contained in the said settlement concerning the hereditaments thereby settled posterior to the limitation of the said term of five hundred years, as at the time of my death shall be capable of effect; AND I CONFIRM the said settlement (*a*). IN WITNESS, &c.

Recital of
settlement.Real estates
subjected
thereto.

(*a*) This will, relating exclusively to real estate, and not containing any appointment of executors, does not require probate. But if executors were named, or the will related to personal as well as to real estate, see, as to the effect of this confirmation of the settlement, and the necessity of probate of the settlement, as being incorporated with the will, *ante*, pp. 12, 13.

No. XXVI.

CODICIL *revoking the Appointment of Two of Three Trustees and Executors, and substituting others.*

THIS IS A CODICIL (a) TO THE LAST WILL AND TESTAMENT of me [*testator's name, &c.*], which will bears date the — day of —, 18—. WHEREAS by my said will I have devised and

As to codicils.

(a) The old signification of the word "codicil" was "a testament not containing the appointment of an executor." But in modern acceptation it denotes simply a supplement to a will, the object of which may be to revoke, confirm, explain or alter, either wholly or partially, the dispositions of the principal instrument, and, as such, it is, in general, to be considered as part of the original will.

Probate of codicils.

Two or more wills or codicils may be entitled to probate, if there is no contradiction or ambiguity upon the face of the instruments, leading by necessary implication to the inference that the testator intended the later to be revocatory of, or substitutional for, the earlier (*Thorne v. Rooke*, 2 Cur. 799). But if the instruments are of a different tenour, the later supersedes the earlier (*Bryan v. White*, 14 Jur. 919, in which case the two wills were made on two successive days). A codicil, duly executed, though merely revoking prior wills, and making no disposition of the testator's property, is a testamentary instrument entitled to probate (*Brenchley v. Still*, 2 Rob. 192; *Brenchley v. Lynn*, Ib. 441); see also *Re Hubbard* (L. R., 1 Prob. 53). A paper called a last will and testament, disposing only of real estate, and not revoking a prior will or appointing executors, was admitted to probate as a codicil (*Re Langhorn*, 5 No. Cas. 512). A codicil to a will may be admitted to probate, although the will itself is not forthcoming (*Re Halliwell*, 9 Jur. 1042; *Tagart v. Hooper*, 1 Cur. 293). But where a codicil is dependent on a will, the destruction of the latter is an implied revocation of the former; and the *onus* of showing that the testator intended the codicil to operate, separately from the will, lies upon the party applying for probate of the codicil alone (*Grimwood v. Cozens*, 2 Sw. & Tr. 364, 5 Jur., N. S. 497; *Re Greig*, L. R., 1 Prob. 72); and see *ante*, p. 34). Where there were two codicils, one intended (according to parol testimony) to supersede the other, but the later contained no clause of revocation, both were admitted to probate (*Re Beetsom*, 6 No. Cas. 13). A codicil was executed in duplicate, and one part was destroyed on the execution of a substituted codicil: the remaining duplicate was not admitted to probate (*Re Hains*, 5 No. Cas. 621).

See also the notes to ss. 20, 22, *ante*, pp. 32, 40.

bequeathed certain real and personal estate and given certain powers to [*three trustees*], as trustees, and appointed them exe-

The operation of a duly-executed codicil upon prior unattested documents has been altered by the Wills Act. Under the old law it must be borne in mind that to a testamentary document dealing only with personalty or copyholds neither signature nor attestation was required: consequently any informal paper, purporting to be a codicil and dealing with the testator's personalty, was so far part of the will, that a subsequent well-executed codicil confirming the will, confirmed also the intermediate codicil (*Guest v. Willasey*, 2 Bing. 429, 3 Bing. 475; *Radburn v. Jervis*, 3 Be. 450); and since the intermediate codicil was itself an operative instrument, and was, by dealing with personalty, in fact a codicil to, and therefore part of, the will—the confirmation of the will by the subsequent codicil (attested by three witnesses) confirmed the dispositions as to real estate of the intermediate unattested document (*Gordon v. Lord Reay*, 5 Sim. 274; and see *Radburn v. Jervis*, *ubi sup.*). See also the following cases, under the old law: *Doe v. Marchant* (8 Jur. 21); *Lady Strathmore v. Bowes*, *Bowes v. Bowes* (7 T. R. 482, 2 B. & P. 100); *Monypenny v. Bristow* (2 R. & M. 117); *Hughes v. Turner* (3 M. & K. 666); *Williams v. Evans* (1 E. & B. 727); *Aaron v. Aaron* (3 De G. & S. 475). See also *Hughes v. Hosking* (11 Moo. P. C. 1, 4 W. R. 755), where, under the old law, a second codicil was held not to have the effect of bringing down the operation of the will to the date of the codicil, so as to comprise realty acquired after the date of the will.

Effect, under old law, of due execution of codicil, upon prior unattested documents.

Under the new law, a will or codicil, not duly executed and attested, is made valid by a subsequent codicil, duly executed and attested, and referring to the will or prior codicil (*Re Smith*, 2 Cur. 796; *Re Wollaston*, 3 No. Cas. 599; *Ingoldby v. Ingoldby*, 4 No. Cas. 493; *Re Drummond*, 2 Sw. & Tr. 8, 8 W. R. 476); and see, as to the acknowledgment of a codicil being an acknowledgment of all the testamentary papers, *Re Jenner* (6 Jur. 564). But an unattested codicil is not part of a will so as to be rendered valid by a later well-executed codicil referring to the will alone (*Re Phelps*, 6 No. Cas. 695; *Haynes v. Hill*, 7 No. Cas. 256). In all cases under the new law, where the virtue of a due execution of a later testamentary instrument is to be extended to prior instruments in themselves invalid, there must be a clear reference in the valid instrument to the invalid—a reference not necessarily in express terms, but sufficient to show, by clear implication and reasonable inference, that the invalid instruments were present to the mind and contemplation of the testator when executing the later instrument, and formed part of his entire testamentary scheme. Where a will and codicil are written on the same piece of paper, less evidence of reference and identity is necessary than when such is not the case (*Re Terrible*, 1 Sw. & Tr. 140, 6 W. R. 816). Thus a writing called "a codicil to my will," which writing was on the same paper with an instrument purporting to be the testator's will, but which was informally exe-

Under new law, valid execution of codicil extends to will or prior codicil, in itself invalid,

if there be sufficient reference to make the prior instrument capable of identification.

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cutors of my will and bequeathed to them a legacy of £——
apiece: Now I REVOKE my said will, so far as the said [two of

Codicils.

cuted—the codicil being of course well executed and subsequent in date to the so-called will—gave effect to the latter (*Re Warrender*, 2 L. T. 317). But where a will and two codicils were all written on the same paper, the first codicil unattested, and the second well executed, and referring to the will, but not to the prior codicil, the will and second codicil only were admitted to probate (*Re Hutton*, 5 No. Cas. 598; and see *Re Willmott*, 1 Sw. & Tr. 36, 6 W. R. 409). A will and codicil, on the same paper, were executed at the same time—the codicil annulling to a great extent the dispositions of the will: it was held that this circumstance was not sufficient to discredit the instruments (*Biddles v. Biddles*, 3 Cur. 458, 7 Jur. 777), and probate was granted of the will and codicil. But where a will and codicil on the same paper were executed at the same time, the will duly executed but the codicil merely signed, probate of the will only was decreed (*Re Taylor*, 15 Jur. 1090). See further, as to the identification of invalid codicils and the incorporation of unattested documents, *Countess De Zichy Ferraris v. Marquis of Hertford* (3 Cur. 468, 7 Jur. 262, 8 Jur. 863); *Re Megarey* (14 Jur. 318), and the cases there cited; *Re Hunt* (2 Rob. 622, 17 Jur. 720); *Re Stewart* (3 Sw. & Tr. 192, 11 W. R. 540); *Re Littledale* (13 Jur. 478); *Re Allnutt* (3 Sw. & Tr. 167); *Ollive v. Weale* (5 No. Cas. 486, 11 Jur. 852); in the last case, in consequence of insufficient reference, probate was refused of two codicils signed by the testator, although in the will he had directed that “all codicils added, if signed by me, after executing this will, shall be equally valid as if placed in the body of this same will,” and although the codicils in question were written on the same piece of paper with the will. But in *Re Childes* (4 No. Cas. 36), probate was granted of two papers held together by a pin, of which the second only was attested, and did not expressly refer to the first.

As to identification of the prior instrument.

A prior instrument may be identified otherwise than by its date, as by reference in a codicil to legacies given by the will (*Re Dickin*, 2 Rob. 298); in that case, the well-executed codicil, not fastened to, or, otherwise than as above, referring to, the informally executed will, rendered the latter valid. In *Allen v. Maddock* (11 Moo. P. C. 427, 6 W. R. 825), a duly executed paper was headed “This is a codicil to my last will,” but contained no other reference to the will; it was held, by the Privy Council, that where there is a reference in a duly executed testamentary instrument, either before or after the Wills Act, to another testamentary instrument, in such terms as to make it capable of identification, it is a subject for parol evidence: and the above reference was held sufficient to identify an informally-executed paper which was found in the testatrix’s bedroom. See also *Re Almosnino* (1 Sw. & Tr. 508, 2 L. T., N. S. 191); *Re Watkins* (L. R., 1 Prob. 19). But the principle of incorporation, as laid down in *Allen v. Maddock*, will not be extended (*Re Greves*, 1 Sw. & Tr. 250, 7 W. R. 86). See further, as to the incorporation of unattested documents, notes to sect. 9, *ante*, pp. 12, 13.

Parol evidence.

the three trustees] are objects thereof, and substitute [*names &c. of substituted trustees*] in their place, and DECLARE that

A mere reference in a duly executed codicil to "my last will," when it appeared that only one will was in existence, was held sufficient to revive a will and codicil (both well executed) which had been revoked by marriage (*Neate v. Picard*, 2 No. Cas. 406). But the rule that a codicil confirming a will makes the will for many purposes bear the date of the codicil, is subject to the limitation that the testator's intention be not thereby defeated (*Doe v. Hole*, 15 Jur. 13).

Revival by reference in later instrument.

Mistakes in codicils are of course treated similarly to mistakes in wills: thus where the word "revoke" was written by an attorney in a codicil instead of "confirm," and the testator did not notice the error, the Court of Probate refused to alter the word to "confirm" (*Re Davy*, 1 Sw. & Tr. 262). Compare the note on the admission of extrinsic evidence, *ante*, p. 320. As to a mistake in the number of codicils (as where a testator called a third codicil the second) see *Bunny v. Hemsted* (3 No. Cas. 593).

Mistakes in codicils.

The revocation by codicil of a bequest is a revocation of a pecuniary legacy to be paid out of that bequest (*Grice v. Funnell*, 1 S. & G. 130).

Revocation of a gift by codicil.

The *onus* is upon those who claim under a codicil, as against a devisee under the will, to show that the intention to displace the devisee is equally clear with the original intention to devise (*Hearle v. Hickes*, 1 C. & F. 20). See also *Maddison v. Chapman* (4 K. & J. 709); *Barclay v. Maskelyne* (Joh. 124); *Robertson v. Powell* (2 H. & C. 762).

A bequest, in a second codicil, of all the testator's property "not hereinbefore or by my will or any other codicil disposed of," was held to revoke a general residuary bequest contained in the will (*Lord Hardwicke v. Douglas*, 7 C. & F. 795). See *ante*, p. 47.

A distinction must be made between a revocation of a gift and a revocation of so much of the will as contains the gift. The effect of these two modes of revocation may be different: thus if there be a bequest to several as tenants in common, and by codicil the bequest to one of them, A., is revoked, his share will not accrue to the others (*Humble v. Shore*, 7 Ha. 247; *Lightfoot v. Burstall*, 1 H. & M. 546): but if the testator revoke so much of his will as contains the bequest to A., then the will is read as if the name of A. did not occur in it at all, and the other tenants in common thus obtain the benefit of the whole original bequest (*Harris v. Davis*, 1 Col. 416).

Where a codicil affects the dispositions of a will or prior codicil, it is an established rule not to disturb the dispositions of the antecedent instrument further than is absolutely necessary in order to give effect to the subsequent codicil. See 1 Jarm. Wills, 162. Thus, a testator, by his will, made a gift for life to the separate use of his three nieces, with remainder to their children; by a codicil, he directed that each of his nieces should have a vested interest transmissible to her children upon her death; it was held that the nieces took to their separate use, since the will, so far as it was not altered, remained (*Vesey v. Vesey*, 12 Jur. 548).

Disposition of will, not disturbed more than necessary.

my said will shall take effect in the same manner as if the names of the said [*substituted trustees*] had been originally

See also *Butler v. Greenwood* (22 Be. 303), as to the revocation by codicil of a discretionary power given by will.

Confirmation of will by codicil.

A general confirmation of a will by a codicil acts upon the will as it existed at the time of execution of the codicil; consequently if a legacy has been revoked, satisfied or adeemed prior to the execution of the codicil in question, such legacy is not revived by the codicil. But, of course, if the codicil contain more than a general confirmation of the will, *e. g.* if it refer to the particular legacy, treat it as an existing legacy, and give something in addition, then the above rule does not apply (*Hopwood v. Hopwood*, 22 Be. 493; but see *S. C.*, 7 H. L. C. 728, 5 Jur., N. S. 897).

Gifts by recital or implication.

That a recital in a will or codicil is a sufficient devise—*e. g.* if a testator recites that he has in the first part of his will given such an estate to A., that estate passes to A., though no such gift actually occurs in the will—see *Yates v. Thomson* (3 C. & F. 572). But to establish a gift of this nature, the recital of having given must be clear and unambiguous; and an erroneous recital in a codicil of an existing bequest contained in the will will not constitute a new bequest (*Mackenzie v. Bradbury*, 35 Be. 617). And as to gifts by recital or implication, see *Edmunds v. Waugh*, 4 Drew. 275; *Ashton v. Horsfield*, 6 Jur., N. S. 355; *Re Turner*, 2 D. F. & J. 527; *Re Smith*, 2 J. & H. 594; and *Jordan v. Fortescue*, 10 Be. 259; in the last case, by a third codicil, a testator gave to A. “500*l.*, in addition to 1,500*l.* which I have before bequeathed to him;” in fact the testator had before bequeathed only 1,000*l.* to A. in two sums of 500*l.* each; it was held that the legatee was entitled by implication to 2,000*l.*

Legacies, cumulative or substitutional.

Where two legacies or annuities are given to the same person, one by will, and the other by codicil, it should be expressly declared whether the latter is to be construed as cumulative or substitutional (*Suisse v. Lord Lowther*, 2 Ha. 424; *Lee v. Pain*, 4 Ha. 201; *Roch v. Callen*, 6 Ha. 531; *Kidd v. North*, 2 Ph. 91; *Tweedale v. Tweedale*, 10 Sim. 453; *Hartley v. Ostler*, 22 Be. 449). Where a legacy is given in each of two separate instruments, the presumption is in favour of the intention to make two gifts; but this presumption may be rebutted by circumstances (*Russell v. Dickson*, 4 H. L. C. 293): and the general rule, that the gift of two different sums will be deemed cumulative, may be controlled by a clear intention to the contrary (*Marquis of Hertford v. Lord Lowther*, 1 R. P. & Conv. Cas. 421). If in both the testamentary instruments the same motive of the gift is expressed and the same sum is given, the Court considers these two coincidences as raising a presumption that the testator did not by the second instrument mean a second gift, but meant only a repetition of the former gift (*Tatham v. Drummond*, 3 N. R. 706). But this presumption arises only where the double coincidence occurs: and does not arise if in either instrument there be no motive, or a different motive, expressed, although the sums be the same; nor does it arise, though the same

inserted throughout the said will instead of the names of the said [*two original trustees*]; BUT I CONFIRM my said will in other respects. IN WITNESS, &c.

motive be expressed in both instruments, if the sums be different (*Hurst v. Beach*, 5 Mad. 358). This, of course, does not apply to cases where the second instrument affords intrinsic evidence of intended substitution: but extrinsic evidence is inadmissible to show that the testator intended the second gift as substitutional and not as cumulative (Id.) See also *Hinchcliffe v. Hinchcliffe* (2 Dr. & S. 96); *Brennan v. Moran* (6 Ir. Ch. Rep. 126); *Tuckey v. Henderson* (33 Be. 174); *Cresswell v. Cresswell* (L. R., 6 Eq. 69); *Hawkins*, Constr. Wills, 303.

Care should also be taken to show distinctly whether a gift by codicil to a legatee under the will is payable out of the same fund, and is privileged with the same exemptions, or subject to the same restrictions, as the legacy given by the will. See 1 Jarm. Wills, 171; the *dictum* of Lord Plunket in *Heron v. Stokes* (3 Ir. Eq. Rep. 169); *Johnstone v. Lord Harrowby* (1 D. F. & J. 183); *Fisher v. Brierley* (30 Be. 265); *Re Smith* (2 J. & H. 594); *Jauncey v. Attorney-General* (3 Gif. 308); *Re Gibson* (2 J. & H. 673); *Hawkins*, Constr. Wills, 306.

No. XXVII.

*CODICIL appointing a Trustee and Executor in the
place of One deceased.*

THIS IS THE FIRST CODICIL TO THE LAST WILL AND TESTAMENT of me [*testator's name, &c.*], which will bears date (a) the — day of —, 18—. WHEREAS [*name*], named in my said will as a trustee and executor, has lately died: Now it is my will that [*name, &c.*] shall be substituted in the place of the said [*deceased trustee*], as one of the trustees and executors (b) of my said will; AND I DIRECT that my said will shall be read and construed as if the name of the said [*substituted trustee*] had been inserted throughout the said will (c), in the place and instead of the name of the said [*deceased trustee*]; AND I CONFIRM my said will, except as aforesaid. IN WITNESS, &c.

Mistaken
reference to
will, by date.

(a) Where a testator has previously made more than one will, the later revoking the earlier, it needs scarcely to be said that care should be taken, in referring to the existing will by its date, that the date of the revoked will be not inserted in the codicil by mistake. See *Re Steele*, *Re May*, *Re Wilson* (L. R., 1 Prob. 575), three cases occurring in the Court of Probate within the same month, in each of which there was a mistaken reference by date in a codicil to a revoked will, instead of the revoking will.

Trustee,
executor,
revocation.

(b) Where the same person is appointed both trustee and executor, a revocation of the appointment as executor is not necessarily a revocation of the appointment as trustee (*Cartwright v. Shepherd*, 17 Be. 301; *Worley v. Worley*, 18 Be. 58); and similarly the trusteeship may be revoked and the executorship remain. In *Sidebotham v. Watson* (11 Ha. 170), an appointment of a person as trustee and executor was, under the circumstances, held to be an appointment as an executor only, and not as a trustee of the express trusts of the will. See also *Moss v. Bardswell* (3 Sw. & Tr. 187).

New trustee,
legal estate.

(c) Care should be taken, where a new trustee is nominated in the place of one who has died or whose appointment is revoked, that the substituted trustee is also clothed with the legal estate in the realty devised upon trust (see *Re Turner*, 2 D. F. & J. 527; *Bennett v. Bennett*, 2 Dr. & S. 266). This is effected by the direction in the text.

No. XXVIII.

DISCLAIMER *by a Devisee and Legatee in Trust.*

TO ALL PERSONS TO WHOM THESE PRESENTS SHALL COME
[*name, &c. of disclaiming trustee*], of, &c., sends greeting.

WHEREAS [*testator*], late of —, deceased, made his last will in writing, duly executed and attested, [*or, made and published his last will in writing, executed and attested as by law was then required for the devise of freehold estates (a)*], bearing date the — day of —, 18—, which will, after devising certain real estates in the manner therein mentioned, purports to give and devise unto the said [*disclaiming trustee*] and to [*other trustees*], their heirs and assigns, all the said testator's freehold and copyhold messuages, lands, tenements and hereditaments whatsoever and wheresoever, To hold the same unto and to the use of the said [*trustees*], their heirs and assigns for ever, upon certain trusts, and with under and subject to certain powers and provisions in the said will expressed concerning the same; And the said will, after giving some specific and pecuniary legacies, purports to bequeath to the same trustees all the residue of the said testator's personal estate and effects, To hold the same unto the said [*trustees*], their executors, administrators and assigns, upon the trusts and for the intents and purposes in the said will mentioned; And the said will purports to appoint the said trustees [*names*], together with certain other persons, executors thereof(*b*): AND WHEREAS the said testator died

Recital of
will;

—death of
testator with.

(a) This form to be used if the will was dated prior to 1838.

(b) If a person who is appointed both trustee and executor acts as executor and takes out probate of the will, he thereby accepts the trusts as to the personalty (*Mucklow v. Fuller*, Jac. 198). It has been held, that if one of two persons named trustees and executors disclaims and renounces, he may afterwards act as the agent of the other who has proved the will and accepted the trusts (*Dove v. Everard*, 1 R. & M. 231); but a disclaimer followed by agency for profit is regarded with suspicion (*Bartlett v. Wood*, 2 L. T., N. S. 144; and see *Lewin, Trusts*, 163).

Trustee and
executor.

Disclaimer.

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—
out altering
will;

—that dis-
claiming
trustee has
not acted in
the trusts,
&c.

Testatum.

without having revoked or altered his said will, which was proved on the — day of —, 18—, in the Principal Registry [or, the District Registry at —] of Her Majesty's Court of Probate [or, the Prerogative Court of the Archbishop of Canterbury], by the said executors, except the said [*disclaiming trustee*], who has duly renounced the probate thereof: AND WHEREAS the said [*disclaiming trustee*] has not accepted any of the devises or bequests expressed to be made to him jointly with the said [*other trustees*] by the said recited will, or any of the trusts, powers or discretions therein expressed to be reposed or vested in or confided to him jointly with the said [*other trustees*], nor done, concurred in or assented to any act, matter or thing capable of being deemed or construed an acceptance of such devises, bequests, trusts and powers, or any of them, but, on the contrary, has, from the time of their first coming to his knowledge, utterly refused, and still does utterly refuse to accept the same: NOW THESE PRESENTS WITNESS, that for better evidencing and making known such refusal as aforesaid, and giving effect thereto, the said [*disclaiming trustee*] doth absolutely reject, renounce and disclaim all the devises and bequests expressed to be made to him by the said recited will, either jointly with the said [*other trustees*] or otherwise, and all the trusts, powers and discretions thereby expressed to be reposed or vested in or confided to him, either jointly with the said [*other trustees*] or otherwise (c). IN WITNESS, &c.

Power of
sale.

Where a power of sale of real estate is given to executors, they may exercise it, although they renounce probate of the will. See Sugd. Pow. 118.

Copyhold,
fine.

As to a devise to trustees and executors of copyhold estate, and that some of such trustee-executors, though all have proved the will and acted thereunder, may renounce their right to be admitted in favour of one of themselves, so that the lord is entitled only to a single fine, see *Lord Wellesley v. Withers* (4 E. & B. 750); but such renunciation or disclaimer must be made before the disclaimants have exercised any acts of ownership over the copyholds (*Bence v. Gilpin*, L. R., 3 Exch. 76). And see *ante*, p. 6.

Disclaimer,
how to be
made.

(c) The old doctrine was, that an estate of freehold could be disclaimed only by matter of record (*Butler and Baker's Case*, 3 Rep. 26). But modern authorities have established the adequacy of a deed (*Townson v. Tickell*, 3 B. & Al. 36; *Niclosen v. Wordsworth*, 2 Sw. 365; *Begbie v.*

Crook, 2 Sc. 128). And it would seem that a deed is not otherwise material than as it affords more solemn and satisfactory evidence of the refusal (*Stacey v. Elph*, 1 M. & K. 195). It is advisable that the disclaimer should be executed as soon as possible after the trust has come to the knowledge of the proposed trustee (*Peppercorn v. Wayman*, 5 De G. & S. 230), for a presumption of acceptance arises from the absence, throughout a long period, of any act at variance with the acceptance of the office (*Re Uniacke*, 1 J. & L. 1; *Re Needham*, Ib. 34; *Wise v. Wise*, 2 J. & L. 403, 412; *King v. Phillips*, 16 Jur. 1080). Where the trust property is a mere chattel interest, a disclaimer by parol is sufficient; whether, in respect of freeholds, a parol disclaimer is sufficient, has been doubted; (but see 3 B. & Al. 38; *Bingham v. Clanmorris*, 2 Moll. 253); assuming, however, that it is effectual, the words used must be decisive and unequivocal (*Doe v. Harris*, 16 M. & W. 517). Before persons are named as trustees, &c., it should be ascertained that they are willing to accept the office; and, in regard to deeds, it would be well if solicitors were in all cases to procure the execution by trustees to prevent dower, trustees of terms, &c.; for though they may appear to be mere formal parties, yet their disclaimer of the estate or interest intended to be vested in them may often produce an important effect upon the state of the title.

Disclaimer
by deed.

By parol.

Instances sometimes occur in practice of persons named as trustees standing mute—refusing either to accept the conveyance or devise, or to execute a deed of disclaimer. There does not appear to be any mode of compelling the execution of a deed of disclaimer; and in such cases it is apprehended that the only course is to file a bill against the party, who would, of course, disclaim by his answer, (*i. e.* by matter of record), and there the proceedings would end. A disclaimer in Court on petition is not entered of record, and in *Re Ellison's Trust* (2 Jur., N. S. 62), V.-C. Wood considered it to be no more than a parol disclaimer, and directed the devisees in trust of a surviving trustee to execute a disclaimer by deed; but in *Foster v. Dawber* (1 Dr. & S. 172), V.-C. Kindersley was of opinion that a disclaimer by counsel on petition was sufficient. It has been decided that in such a case the disclaiming trustee can only be allowed costs as between party and party (*Norway v. Norway*, 2 M. & K. 278; *Bray v. West*, 9 Sim. 429).

In Court.

Costs.

The effect of the disclaimer is to strike the name of the disclaiming party out of the instrument *ab initio*. Thus, supposing the devise to be to three jointly, if one disclaim, the entirety, together with the powers and discretions attached to the office of trustee, will be vested in the other two, as from the testator's death; see *Adams v. Taunton*, 5 Mad. 435; *Eaton v. Smith*, 2 Be. 236; *Lord Granville v. McNeile*, 7 Ha. 156; *Ewing v. Addison*, 7 W. R. 23. If all disclaim, there will be an intestacy, and the estate will descend as undisposed of to the heir, but subject in equity to the performance of the trusts.

Effect of dis-
claimer.

Heir cannot
disclaim.

The heir of one who has accepted the office of trustee cannot disclaim; and devisees in trust who accept the trusts of a trustee's will cannot disclaim trusts which their testator had accepted (*King v. Phillips*, 16 Jur. 1030).

See also, as to disclaimer, Lewin, *Trusts*, 161; 3 Jarm. Conv. 698; 4 Ib. 434; *Urch v. Walker* (3 M. & C. 702); *Seton v. Slade* (7 Ves. 265). As to disclaimer by married women, 8 & 9 Vict. c. 106, s. 7. As to the presumption of disclaimer and election, see *Harris v. Watkins* (2 K. & J. 473). And as to partial acceptance of trusts, and partial disclaimer, see *Malzy v. Edge* (2 Jur., N. S. 80).

MISCELLANEOUS FORMS.



THE WILL of A. B., of —, in the county of —, esquire. Commence-
ments of
wills.

THIS IS THE LAST WILL AND TESTAMENT of me —, of —,
in the county of —, gentleman.

THIS IS THE LAST AND ONLY (*a*) WILL of me, A. B., late of
—, but now of —, merchant, to take effect only in the
event of my not leaving any issue living at my death.

I, A. B., of, &c., hereby revoke all my prior testamentary
dispositions, and declare this to be my last will and testament.

I, A. B., of —, &c., make this my last will and testament,
in manner following, that is to say ;

I, A. B., of —, in the county of —, in England, late a
captain in Her Majesty's — Regiment of Foot, a domiciled
Englishman, but now residing temporarily (*b*), for the benefit

(*a*) The insertion of the word "only" is equivalent to a revocation of
prior wills. See 11 Jarm. Conv. 429 (*c*).

(*b*) As to the effect given to a testator's description of himself in his
will, in respect of his domicile, and the permanent or temporary nature of
his residence abroad, see *De Mora v. Concha* (Prob. Ct., 28 July, 1860);
Re Steer (3 H. & N. 594); *Attorney-General v. Pottinger* (6 H. & N.
733, 9 W. R. 578); *Attorney-General v. Kent* (1 H. & C. 12, 10 W. R.
722). A declaration of intention to retain an English domicile, though
entitled to weight, will not prevail against facts showing the acquisition of
a foreign domicile. See further, on domicile, Appendix.

Commence-
ments of
wills.

of my health [*or*, for the purposes of study, *or*, for the education of my children] at —, in the empire of France, do make my last will and testament (*c*) as follows:—

I, A. B., of &c., the eldest son and heir apparent (*d*) of C. B. of —, in the same county, esquire, by Rosalie, his wife, who, before her marriage with him was Rosalie C., spinster, the

(*c*) This will should be executed and attested as required by the law of England, but by virtue of 24 & 25 Vict. c. 114 (see *Appendix*), would be entitled to probate in this country if executed according to the forms required by the law of France.

Legitimacy
Declaration
Act, 1858.

(*d*) By stat. 21 & 22 Vict. c. 93, s. 1, "Any natural-born subject of the Queen, or any person whose right to be deemed a natural-born subject depends wholly or in part on his legitimacy or on the validity of a marriage, being domiciled in England or Ireland, or claiming any real or personal estate situate in England, may apply by petition to the Court for Divorce and Matrimonial Causes, praying the Court for a decree declaring that the petitioner is the legitimate child of his parents, and that the marriage of his father and mother, or of his grandfather and grandmother, was a valid marriage, or for a decree declaring either of the matters aforesaid; and any such subject or person, being so domiciled or claiming as aforesaid, may in like manner apply to such Court for a decree declaring that his marriage was or is a valid marriage, and such Court shall have jurisdiction to hear and determine such application, and to make such decree declaratory of the legitimacy or illegitimacy of such person, or of the validity or invalidity of such marriage, as to the Court may seem just; and such decree (except as in the Act mentioned, see sect. 8), shall be binding to all intents and purposes on her Majesty and on all persons whomsoever." See *Shedden v. Attorney-General* (2 Sw. & Tr. 170, 9 W. R. 285); *Re Bouverie* (10 W. R. 811); *Re Upton* (1 N. R. 109).

By sect. 2, applications are authorized to the same Court for a declaration of right to be deemed a natural-born subject. As to Scotland, see sect. 9. As to Ireland, 31 & 32 Vict. c. 20.

As to administering in Chancery the trusts of a settlement made for the purpose of obtaining a declaration of illegitimacy, see *Gurney v. Gurney* (1 H. & M. 413); *Anon.* (2 H. & M. 124); *Cooke v. Cooke* (6 N. R. 134).

Perpetuation
of testimony,
5 & 6 Vict.
c. 69.

By the stat. 5 & 6 Vict. c. 69, any person "who would, under the circumstances alleged by him to exist, become entitled, upon the happening of any future event, to any honour, title, dignity, or office, or to any estate or interest in any property real or personal, the right or claim to which cannot by him be brought to trial before the happening of such event," is entitled to file a bill in Chancery "to perpetuate any testimony which may be material for establishing such claim or right."

only child of Sir Ralph C., of —, in the county of —, Baronet, deceased, make this my last will in manner following, that is to say ;—

I APPOINT —, of &c., and —, of &c., to be executors (e) Appointment of executors.
of my will.

I APPOINT —, of &c., and —, of &c., to be trustees and executors of my will: And I give to each of them who shall accept the offices of trustee and executor the sum of £— as a slight acknowledgment for the trouble he will have in acting under this my will. —legacies to executors.

I APPOINT — of —, and — of —, to be my trustees and executors, and, together with my wife during her widow- Appointment of trustees, executors

(e) An appointment of executors written lengthwise in the margin of a will, the execution being at the foot of the disposing part, was excluded from the probate (*Re Tookey*, 5 No. Cas. 386). But an appointment of executors, written across a will drawn on a printed form, was included in the probate, there being some facts from which the Court inferred that the appointment of executors was written before the execution of the will (*Re Ryton*, 5 No. Cas. 406). As to appointment of executors.

Where a testator left the residue of his property unto his “wife A. and son B. as whole and sole executrix,” the Court granted probate to the two conjointly (*Re Court*, 10 W. R. 809). And see *Re Sawtell* (2 Sw. & Tr. 448, 10 W. R. 782), a case in which no person could be found answering the description of the executor nominated in the will. The nomination of a second set of executors is not a revocation of the appointment of a former set, but all are entitled to come in and join in probate (*Re Leese*, 2 Sw. & Tr. 442; and see *Geaves v. Price*, 3 Sw. & Tr. 71, 11 W. R. 809). But the appointment by codicil of a *sole* executor is a revocation of an appointment of other persons in the will (*Re Lowe*, 3 Sw. & Tr. 478). In *Re Baylis* (2 Sw. & Tr. 613), where the testator appointed “A. as my executor with any two of my sons,” the appointment of any two sons was held void for uncertainty. Where a testator gave a legacy to each “executor and witness,” but without naming any executor, notwithstanding the words “executors and witnesses” opposite the names of the attesting witnesses, it was held that there was no appointment of executors (*Re Woods*, L. R., 1 Prob. 556).

That an executor may be appointed for his life only, without power of transmitting the office to his own executors (in the event of his being the sole or last surviving executor), see *Re Fozard* (3 Sw. & Tr. 173; 9 Jur., N. S. 756).

and guar-
dians.

hood, to be guardians of my children during their respective minorities.

Conditional
appointment
of son to be
trustee and
executor.

I DECLARE that if my said son, Henry B., shall, at the time of my death, have attained the age of twenty-one years, he shall be a trustee and executor of my will, which in that case shall be construed and take effect as if his name had been herein inserted throughout along with and immediately before the names of the said [*trustees*] A. B. and C. D.

Appointment
of son to be
trustee on
attaining
twenty-one.

I DECLARE that on my son William B. attaining the age of twenty-one years, I appoint him a trustee of this my will, and I direct that my will shall from the time of his acceptance of the trusteeship take effect and be construed as to the property then remaining subject to the trusts hereof in the same manner as if my said son William had been originally named a trustee, jointly with the said M. and N.: I declare that until the said appointment of my son William shall take effect, such appointment shall not fetter or prejudice the exercise of the trusts, powers or discretions hereby given to the said M. and N., or the survivor of them, or other the trustees or trustee to be from time to time appointed in their or his stead; And that if my son William shall die (whether in my lifetime or after my death) before attaining the age of twenty-one years, or if on attaining that age he shall be incapable or unfit, or shall omit or refuse to act as a trustee, it shall be lawful for, but not compulsory on, the trustees or trustee for the time being of this my will, to appoint, in manner aforesaid, a trustee in the place of my son William, it being my wish that there shall be from time to time not more than three nor less than two trustees of my will.

Appointment
of wife
during
widowhood.

I APPOINT my wife [*name*], and —, of &c., and —, of &c., to be trustees and executors of my will: But if my said wife shall marry again, she shall thereupon cease to be a trustee and executor of my will, which shall thenceforward be construed and take effect, and be executed in the same or the like manner as if the said — and — [*other trustees*] had been hereby originally appointed the sole trustees and executors.

I APPOINT my wife [*name*], and my son [*name*], and my brother [*name*], to be executors and trustees of my will as to the property and assets, which, at the time of my death, shall be embarked in trade (*f*): And I APPOINT A. B. of &c., C. D. of &c. and E. F. of &c., to be trustees and executors as to all other my real and personal property.

Appointment of special executors;

I APPOINT A. B. of &c., and C. D. of &c., to be my executors in respect of the debt or debts (*g*) (if any) owing to me by my brother [*name*] at the time of my death.

—in respect of a debt;

I GIVE my leasehold house, No. —, — street, in —, in the county of York, with the garden and appurtenances thereto belonging, or usually enjoyed therewith, to my son [*name*], he paying the rent, and performing the lessee's covenants in respect of the said leasehold premises: And I APPOINT my said son my executor as to the same leasehold premises (*h*), and direct that the costs of and incidental to the obtaining of a limited probate by my son shall be paid out of my residuary estate, and (except as aforesaid) I APPOINT [*names, &c.*] to be trustees and executors of my will.

—as to leaseholds specifically bequeathed.

I BEQUEATH all that piece of building land, containing about — square yards, situate in — street, —, in the county

Specific bequest of building land,

(*f*) See 1 Wms. Exors. 241; *ante*, p. 311, n. (*a*).

(*g*) The appointment of testator's debtor to be executor destroys the remedy against him at law for the debt. By the appointment of a special executor, as in the text, the legal remedy is vested in him. But the appointment of a debtor to be executor is no more than a parting with the action, and does not operate in equity as a release of the debt as against legatees; *à fortiori*, the debt is assets for the payment of testator's debts. See *Ingle v. Richards* (28 Be. 366), where a debt not recoverable at law (because the debtor was executor) or in equity (because barred by the statute of limitations) was held assets in the hands of a proving executor.

Debtor appointed executor.

(*h*) This special appointment of an executor is made for the purpose of transferring the liability of the executors for general purposes under the covenants in the lease (see *ante*, p. 153) from the latter, who have simply a fiduciary interest in the leasehold, to the person having the beneficial ownership. See *Lynch v. Bellew* (3 Phillim. 432); *Re Barnes* (7 Jur., N. S. 195). See also, as to the appointment of special executors, 4 Dav. Conv. by Waley, 102; and as to executors in or for a particular country, see *Re Wallich* (3 Sw. & Tr. 423); *Velho v. Leite* (*ib.* 456).

Special executor, reason for.

—and appointment of special executor in respect thereof.

of —, which I have agreed to take on a building lease from Mr. —, and all buildings, and the wood, stone, bricks, lime and other materials which shall be upon the said piece of land at my death, to my son —, his executors, administrators and assigns, he and they nevertheless paying the rent, and performing the tenant's or lessee's covenants and agreements in respect of the same piece of land (*i*), and indemnifying my estate therefrom, except that the apportioned current rent of the said piece of land down to and inclusive of the day of my death shall be paid out of my residuary estate: I APPOINT my same son my executor as to the premises comprised in the last bequest, and as to all other my personal estate, I appoint — of &c. and — of &c., to be my executors.

Directions as to post-mortem examination.

I DIRECT that an anatomical examination be made of my body as soon as possible after my death by two competent surgeons to be selected by my executors, and such surgeons shall forthwith deliver a report in writing of the result of such examination to my executors, who shall on receipt of such report pay to each of the said surgeons as a remuneration for his trouble a sum of money not exceeding — guineas (*j*).

Covenant to build.

(*i*) In the absence of this direction as to the burthen of the covenants to build, the legatee could (contrary, no doubt, in most cases to the wishes of the testator) require the contract to be performed at the cost of the residuary estate (*Marshall v. Holloway*, 5 Sim. 196); *contra*, as to covenants to repair and pay fines for renewals upon deaths happening after the testator's (2 Jarm. Wills, 595, 596).

Anatomy Act. Disposal of body after death.

(*j*) By the "Act for regulating Schools of Anatomy" (2 & 3 Will. 4, c. 75), it is enacted (s. 8), "that if any person, either in writing at any time during his life, or verbally in the presence of two or more witnesses during the illness whereof he died, shall direct that his body after death be examined anatomically, or shall nominate any party by this Act authorized to examine bodies anatomically to make such examination; and if before the burial of the body of such person, such direction or nomination shall be made known to the party having lawful possession of the dead body, then such last-mentioned party shall direct such examination to be made, and, in case of any such nomination as aforesaid, shall request and permit any party so authorized and nominated as aforesaid, to make such examination, unless the deceased person's surviving husband or wife, or nearest known relative, or any one or more of such person's nearest known relatives, being of kin in the same degree, shall require the body to be interred without such examination."

I DIRECT that my body be interred without ostentation, at a cost not exceeding £—, in the family vault, in the church-yard of the parish church of —.

Directions as to funeral.

I DIRECT that my remains be buried with plainness and privacy in the cemetery of —.

I DIRECT that the expense of my funeral shall not exceed £—.

I GIVE the sum of £— to A. B. of —, in the county of —; but if he shall die in my lifetime, I give the same sum to his executors or administrators as part of his personal estate.

Provision against lapse.

I GIVE to my said trustees [*names*] the sum of £—, which is to bear interest after the rate of — per cent. per annum from the time of my death, upon the trusts and for the purposes hereinafter expressed concerning the same.

Pecuniary legacy to trustees upon trusts after declared.

I GIVE to my said son —, and my said wife, the sum of £— free from legacy duty, to be raised and paid at the end of five years from my death (unless my executors shall think fit sooner to raise the same), together with interest thereon from my death, at the rate of — per centum per annum, such interest to be paid by equal half-yearly payments in the meantime, upon and for the trusts and purposes hereinafter expressed concerning the same.

Legacy—payable at the end of five years, or sooner at discretion of executors.

And by the 7th sect. it is made “lawful for any executor or other party having lawful possession of the body of any deceased person, and not being an undertaker or other party entrusted with the body for the purpose only of interment, to permit the body of such deceased person to undergo anatomical examination, unless to the knowledge of such executor or other party, such person shall have expressed his desire, either in writing at any time during his life, or verbally in the presence of two or more witnesses during the illness whereof he died, that his body after death might not undergo such examination, or unless the surviving husband or wife, or any known relative of the deceased person, shall require the body to be interred without such examination.”

Anatomy Act.

Pecuniary
legacies;

I BEQUEATH the pecuniary legacies following; namely, To my said wife the sum of £—— for her immediate use; To each of my said other trustees and executors the sum of ——, as an acknowledgment for his trouble in executing the office of trustee and executor of my will; To the said [name] individually, and without reference to his office of trustee and executor, the sum of £——; To A. B. of &c., the eldest (k) son

Misnomer or
misdescription
of persons.

(k) In cases of misnomer or misdescription, the general rules are, (1), *Veritas nominis tollit errorem demonstrationis*, and (2), *Nihil facit error nominis cum de personâ constat*. See Broom's Maxims, 562—575. Thus, by virtue of the first maxim, a bequest to "C. M. S., the legitimate son of C. S.," was held good, though the person named turned out to be a bastard (*Standen v. Standen*, 2 Ves. j. 589). And by virtue of the second maxim, a devise to "William P. the eldest son of Charles P." was held to be a good devise to the eldest son whose name was not William, but Andrew; the words of description being sufficient to point out with certainty the intended object of bounty (*Pitcairne v. Brase*, Ca. t. Fin. 403).

See also *Bradshaw v. Bradshaw* (2 Y. & C. Ex. 72); *Re Clergy Society* (2 K. & J. 615); *Stringer v. Gardiner* (4 De G. & J. 468); *Mostyn v. Mostyn* (5 H. L. C. 155); *Adams v. Jones* (9 Ha. 485); 1 Jarm. Wills, 350.

In *Beaumont v. Fell* (2 P. W. 141), though the legatee's christian and surnames were both mistaken, the legacy was held good: but this case is now overruled by *Miller v. Travers* (8 Bing. 244, 1 Moo. & S. 342). In *Re Gregson's Trusts* (2 H. & M. 504), legacies to persons described only by their surname were supported.

Mistakes may occur both in the name and the description. A gift to "John N., second son of William S. N., vicar of T.," was held a good gift to John Pryce N., third son of William R. N., vicar of T. (*Nembolt v. Pryce*, 14 Sim. 354); and a devise "to Elizabeth A., a natural daughter of E. A. single woman," was held a good devise to John A. the only natural child of E. A. (*Ityall v. Hannam*, 11 Jur. 761). See also *Drake v. Drake* (25 Be. 643, 8 H. L. C. 172); *Garner v. Garner* (29 Be. 114); *Re Gregory's Settlement and Will* (34 Be. 600). In a gift to children, "except Thomas the eldest son," where it turned out that Thomas was the youngest son, the exception was, by V.-C. *Stuart*, held void for uncertainty (*Hodgson v. Clarke*, 1 Gif. 139), but the decision was reversed on appeal (1 D. F. & J. 394), and it was held that the eldest son, and not Thomas, was to be excepted.

In many cases of the class now under consideration, only one claimant appears. The difficulty of the question is increased when there are competing claimants. When this is the case, the first maxim is not extended

of R. B. of —, the sum of —; To each of the domestic servants who shall be in my service at my decease one year's

so as to entitle a person who more nearly answers to the name but to whom the description is inapplicable, and to exclude a claimant to whom the description applies (*Blundell v. Gladstone*, 1 Ph. 279; *Camoy's v. Blundell* 1 H. L. C. 778). Where part of the description applies to one claimant and part to another, the gift fails for uncertainty; parol evidence is inadmissible to remove the ambiguity, and show the testator's intention. But where part of the description applies to each claimant, and part to neither, parol evidence is admissible; see note (i) to Prec. XX., *ante*, p. 320.

To the interpretation and construction of written instruments in general, the following maxim applies: *Benignæ faciendæ sunt interpretationes, propter simplicitatem laicorum, ut res magis valeat quam pereat; et verba intentioni, non e contra, debent inservire*. To which may be added, *In testamentis plenius voluntates testantium interpretantur. Ultima voluntas testatoris est perimplenda secundum veram intentionem suam*. See these rules explained and illustrated in Broom's Legal Maxims, 493—507.

Construction of wills.

In the construction of wills, it is a settled rule that where two clauses or gifts are contradictory and inconsistent, so that they cannot possibly stand together, that clause or gift which comes last, which is nearest in position to the end of the will, shall prevail: *cum duo inter se pugnancia reperiuntur in testamento ultimum ratum est* (Broom's Maxims, 518): the last words are considered to express the latest intention of the testator. But this rule is subject, in its application, to the doctrine that the testator's intent is to be gathered from the general tenour of the will; so that a clause which cannot be reconciled with the general scheme of the will will be rejected, whatever the local position it may happen to occupy in the instrument. And the rule is never applied except when a reconciliation of the clauses or gifts is impossible: any construction of the contradictory clauses which will render both effective is preferred to the entire sacrifice of the earlier clause. Thus where a testator has in different parts of the same will given the same lands to different persons in fee; even here ingenuity has discovered a conciliatory construction, and the devisees take concurrently as joint tenants.

As to contradictions in wills.

See further, on the effect of repugnancy or contradiction in wills, 1 Jarm. Wills, ch. 15; and the following cases, *Doe v. Pedley* (1 M. & W. 662); *Doe v. Nevill* (12 Jur. 181); *Brocklebank v. Johnson* (20 Be. 205); *Markham v. Ivatt* (Ib. 582); *Passmore v. Huggins* (21 Be. 103).

It is not sufficient to invalidate a will, that the testator, at the time of its execution, was under a mistake as to the legal effect of a prior instrument with reference to the interest which an intended object of his bounty took under such instrument (*Browning v. Budd*, 6 Moo. P. C. 430; 13 L. T. 1). To be a ground for equitable interference, a mistake must be in fact, and not in law (see *Midland G. W. of Ireland Railway v. Johnson*,

Mistaken construction of wills.

—time of
payment.

wages (in addition to what may be then due to him or her for wages), and a suit of mourning at the discretion of my executors; To &c. [*other pecuniary legacies*]; And I direct the legacy hereinbefore bequeathed to my said wife to be paid or retained out of the first moneys which shall come to the hands of my trustees and executors, and the other legacies hereinbefore bequeathed to be paid or retained at the end of twelve calendar months from my decease, unless my executors shall think fit sooner to pay or retain the same.

Legacy to
charity.

I GIVE the sum of £—— to the Society for Promoting Christian Knowledge, the same to be paid for the purposes of the said Society to the Treasurer for the time being thereof, whose receipt shall be a good discharge for the same; And I direct that a sufficient part of my pure personal estate, before any other payment thereout, shall be applied in payment of the said charitable legacy.

Bequest to
trustees, to
carry inter-
est, &c.

I BEQUEATH the sum of £—— to my said trustees [*names*], to be paid or retained at the end of —— calendar months next after my decease, and to carry interest from my decease at the rate of —— per cent. per annum, and to be held by my said trustees, Upon the trusts and subject to the provisions following, that is to say, IN TRUST for my younger children, the said A. B., C. B., D. B. and E. B., in equal shares; but in case any or every of such younger children, being sons, shall die under the age of twenty-one years, or become an eldest or only son, entitled under the provisions hereinafter contained to the possession of my manors, hereditaments and real estate, or to the receipt of the rents and profits thereof, before he shall have attained that age; or in case any or every of my said younger children, being

Upon trust
for younger
children
nominatim.
On death of
any and
every
younger son
under
twenty-one,
or on any
such son be-
coming the
eldest son;
or on death
of any and

6 H. L. C. 798, 810; where however the mistake was in the construction of a contract); but see *Stone v. Godfrey* (5 D. M. & G. 76): see also *Trigge v. Lavallée* (1 N. R. 454). Where a testator A. gave all his property to B., stating that, on his (A.'s) death, what he had received from his father C. would devolve, under the will of C., on the nephews (and nearest relations) of A.; whereas the paternal property was, in the events which had happened, part of A.'s estate; it was held that this amounted to an exception of the property in question from the general gift to B., and that it went as in the case of an intestacy (*Circuit v. Perry*, 23 Be. 275).

daughters, shall die under the age of twenty-one years, without having been married with the previous consent in writing of her or their guardian or guardians, or become an eldest or only daughter entitled as aforesaid, then with or out of the share and accretions under this clause to the share of every younger child so dying, the sum of £1,000 shall be added to the share of each other of my said younger children, and subject to the making of such additions, the share and accretions thereto of every younger child so dying shall sink into the residue of my personal estate. And I empower the trustees or trustee for the time being of my will, during the respective minorities of my younger sons, and the respective minorities and discoverture of my younger daughters, for the time being entitled to shares of the said trust fund, to apply the whole, or such part as my said trustees or trustee shall in their or his discretion think sufficient, of the annual income of such shares respectively, in or towards the maintenance and education, or otherwise for the benefit, of such younger sons and daughters respectively. And I direct my said trustees or trustee to accumulate the unapplied surplus of such annual income, by investments in their or his names or name, in or upon such stocks, funds and securities as are hereinafter mentioned, and add the accumulations thereof to the capital of the respective shares whence the same shall have arisen, but with power for my said trustees or trustee to apply such surplus and accumulations in manner aforesaid. And I direct my said trustees or trustee in the meantime, until the respective shares of my said younger children of the said trust fund shall become payable, to invest the same in the names or name of my said trustees or trustee, in or upon any of the public stocks, funds or securities of the United Kingdom, or on any real securities in England or Wales, but not in Ireland or elsewhere, and not in or upon any other kind of security, with power to vary the investments from time to time for any other or others of a like nature.

every daughter under twenty-one, without having married with consent, then out of the share of the children so dying, £1,000 to be added to the share of each of the other younger children, and the balance to fall into the residue.

Maintenance.

Accumulation.

Investment of shares.

I BEQUEATH the several annuities following; namely, To [name, &c.], an annuity of £—; To [name], the wife of [name], an annuity of £—, for her sole and separate use, free from marital control, and without power of anticipation; To &c. [other annuities]; the said annuities to be payable

Life annuities;

—time of payment;

—proportionate part;

—appropriation of funds.

during the respective lives of the several annuitants, in equal half-yearly portions, the first of such portions to be paid at the end of six calendar months from my decease, and a proportionate part of each annuity to be paid to the executors or administrators of the annuitant down to, and inclusive of, and within one calendar month next after, the day of his or her decease. And as to each of the said annuities I empower my trustees and executors to appropriate in their names a fund, in Three per cent. stock [*or*, in any of the investments hereinafter authorized with respect to any of the trust moneys hereinafter mentioned or referred to], sufficient at the time of appropriation to answer, by the dividends [*or*, annual income] thereof, the payment of the annuity, and in the meantime to pay the annuity out of the moneys to arise from my real and residuary personal estate hereinafter devised and bequeathed; but the annuity shall, after such appropriation as aforesaid, be payable out of the appropriated fund exclusively, in exoneration of my other estate, and such fund shall, subject to the payment of the annuity, form part of my residuary personal estate.

Annuity, bequest of, to valet.

I GIVE to G. A., who now resides at S., in Italy, and who formerly lived with me as travelling servant for the space of — years or thereabouts, an annuity of £—, to be paid to the said G. A. during his life, free from legacy duty and all other deductions; and I direct that the said annuity shall be paid to the said G. A. personally, or to such person as he shall from time to time, but not by way of anticipation, authorize to receive the same, by equal half-yearly payments on the — day of — and the — day of — in every year; and that the first half-yearly payment thereof shall be made on such of the said days as shall first happen after my decease, and that a proportionate part shall be paid down to the death of the annuitant. But I declare that in case the said G. A. shall do or suffer any act or thing whereby the said annuity or any part thereof shall be assigned, charged, or incumbered, the said annuity shall wholly cease. And I request that my executors will make provision for the punctual payment of the said annuity out of my personal estate, periodically, as it becomes due, to the said G. A. at S., or at such other place as he may happen, for the time being, to reside in. Provided always, that it shall be lawful for

Cesser on alienation.

my said executors to accept the bond of the said —, the residuary legatee of my personal estate, as sufficient security for the payment of the said annuity, and that it shall not be incumbent upon them, in that case, to appropriate or set apart any fund to answer the same.

Power to accept bond of residuary legatee as a security.

I DIRECT my trustees, as soon as may be after my death, to sink the sum of £—— hereinbefore bequeathed to them [*or*, one-fifth part of my net residuary estate], in the purchase, from any person or persons or from any reputable insurance company in Great Britain, of a clear irredeemable annuity, to be payable to my trustees during the life of my nephew K. B., of &c., in equal portions, half-yearly or quarterly, and if not purchased from any insurance company, to be well secured on real or Government securities, or other good security, in the discretion of my trustees; And upon further trust to receive the annuity to be so purchased as last aforesaid, as the same shall from time to time become due; and if my said nephew shall not at my death be an undischarged bankrupt (*m*), to pay the same into the hands of my said nephew, until he shall become bankrupt, or until he shall do or suffer some act or thing whereby the said annuity shall be wholly or partially assigned, charged or incumbered. And on and after the bankruptcy or doing or suffering of any such act or thing as aforesaid, then the said annuity shall cease to be payable to my said nephew, and shall be held by my trustees upon the trusts following; namely &c.

Trust to sink part of residue in a life annuity to be paid to the *cestui que vie* till bankruptcy or alienation.

I DIRECT that a proportionate part of the said annuity [*which is payable out of rents and annual income of residuary estate*], current at my wife's death, shall be paid in respect of the fraction of a quarter immediately preceding her death. And as to the rents and income aforesaid (subject to

Annuity; proportionate part down to death of annuitant.

Rents (subject to an-

(*m*) See *Re Muggeridge's Trusts* (Joh. 625), as to the effect of insolvency before the annuity was actually payable; and *Dorsett v. Dorsett* (30 Be. 256), in which case it was held that a clause of forfeiture on bankruptcy affected a share which accrued after the bankrupt had obtained his certificate, as well as his original share, and that the effect was to accelerate the interests in both shares of those persons claiming by reason of the forfeiture. See also *White v. Chitty* (L. R., 1 Eq. 372); *Lloyd v. Lloyd* (2 Eq. 722); *Cox v. Fonblanque* (6 Eq. 482).

Forfeiture on bankruptcy.

nuity to wife
marrying
again) to go
as if wife
were dead.

the said annuity), the same shall, in the event of my said wife's marrying again, be paid and applied in the manner in which the whole of the said rents and income would, for the time being, be payable and applicable under this my will, in case my said wife were dead.

Annuities to
accrue *de die
in diem*.

I DIRECT that the annuities hereinbefore bequeathed shall be deemed (in like manner with interest on money borrowed) to accrue due from day to day, to the intent that the several annuitants may be entitled to their respective annuities, or proportionate parts thereof, down to, and inclusive of, the days of their respective deaths.

Charge of
legacy on
specific real
estate, with
provision for
discharge
thereof.

I CHARGE the said sum of £—, in aid of my personal estate (*n*), upon my freehold estates at —. And I declare that upon the investment by the trustees or trustee for the time being of this my will, of the said sum of £—, in or upon any one or more of the investments hereinafter authorized, my said personal estate and the said estates at — shall thenceforth and for ever be liberated from all and every trust, charge and liability in respect of the said sum of £—, and all interest thereon. And I declare that the production, or other proof of the execution by the persons or person who shall be the trustees or trustee of this my will at the time of such investment, of a deed declaring that such sum had been invested pursuant to the directions of this my will, and the trusts upon which they or he held the same sum at the time of the investment thereof, or a recital to the same effect, in any deed executed by

Charge of
legacies on
real estate.

(*n*) A mere charge of debts or legacies upon the realty, or a charge upon the realty in aid of the personalty, does not alter the order and priority in which the different kinds of property are liable for the satisfaction of the debts or legacies (2 Jarm. Wills, 613, 635). But a charge upon real estate in exoneration of the personal estate transfers the primary liability to the estate so charged.

And a general charge of annuities and legacies upon all the testator's real and personal estate (and therefore in terms including estates devised specifically) will not alone be sufficient to bring the specifically-devised estates within the scope of the charge (*Conron v. Conron*, 7 H. L. C. 168). But see *Maskell v. Furrington* (1 N. R. 37, affirming 10 W. R. 728); *Lord Portarlington v. Damer* (3 N. R. 264).

the trustees or trustee for the time being of this my will, shall in favour of purchasers or mortgagees of the said hereditaments so charged in aid of my personalty with the said sum of £——, be conclusive evidence of the due investment thereof, and shall exonerate such purchasers or mortgagees therefrom, and from all liability in respect of the insufficiency of the said investment and securities, and from seeing to the application of the same sum, and from inquiring into or taking notice of the misapplication thereof, or of any part thereof.

I DECLARE that, notwithstanding the trusts hereinbefore contained of the annual income of the said sum of £—— and the investments thereof for the separate use of my said daughter Caroline, it shall be lawful for my trustees or trustee, so long as they or he shall deem it expedient so to do, to pay or remit the annual income of the said sum of £—— and the investments thereof, to such banker or agent as my same daughter shall from time to time appoint, or to authorize such banker or agent to receive the same, for the purpose of remittance or payment as my same daughter shall direct; and every payment or remittance which shall be made by my trustees or trustee, to or through the agency of a banker or agent appointed by my said daughter, shall, until such appointment be withdrawn by her, be a good discharge to my trustees or trustee for the money which shall be so paid; but this provision shall not preclude my trustees or trustee from requiring from time to time, as the said annual income shall arise, a special direction from my said daughter respecting the application thereof, or otherwise from paying the same into her proper hands, if my trustees or trustee shall deem it advisable so to do (o).

Separate estate of married woman —special directions as to payments through a banker or agent.

I GIVE the sum of £—— to my said trustees [*names*], Upon trust to invest the same, &c., and UPON TRUST to pay the annual income of the said sum of £——, and the investments thereof, to the said Mary —— for her life, to be enjoyed by her

Separate use of female during every coverture.

(o) This clause is framed to remove the doubt whether a trustee is justified in remitting income through a banker or agent to a married woman permanently resident abroad.

during any and every (*p*) coverture as her separate property free from marital control, and without power of anticipation, and from and after her decease, &c.

Trinkets,
&c. to wife.

I GIVE to my wife [*name*] all the trinkets, jewellery, paraphernalia and ornaments of her person which shall have been used by her previous to my death. But as to my gold and silver plate, and my collection of paintings in oil, I desire that the same may go and be enjoyed as heir-looms with the freehold estates comprised in my marriage settlement.

Paintings,
&c. as heir-
looms.

Wife to have
the use of
household
furniture,
&c.;

I BEQUEATH to my said wife the personal use and enjoyment, in her residence for the time being, so long as she shall continue my widow and shall reside in England, of all my household furniture, plate, linen, china, glass, books, pictures, prints, musical instruments, and other effects of the like nature, which shall, at my decease, be in or about my then dwelling-house: And I direct my trustees and executors for the time being (other than my said wife) to deliver the same to her within one calendar month next after my decease, on her signing an inventory thereof to be prepared and kept by my said other trustees and executors, who shall at the same time deliver to her a duplicate copy of such inventory signed by them: And I empower my said other trustees and executors for the time being, by writing under their hands, to determine, in case of dispute, what articles shall be considered as included in the bequest lastly hereinbefore contained; and I exonerate them from all responsibility in respect of the effects included in the same bequest, after such delivery thereof as aforesaid, until they shall receive actual notice that my said wife is dead, or has married again, or is resident out of England.

—delivery
and inven-
tory;

—power to
determine
questions;

—trustees'
responsibility.

Separate use,
&c. should
comprise
every future
coverture.

(*p*) The language of the trust should in these cases be perfectly general, so as to include every successive coverture; the use of more restricted terms might confine the trust for separate use, and the restraint of anticipation, to the coverture for the time being, or the first coverture only (see *Knight v. Knight*, 6 Sim. 121; *Re Gaffer's Settlement*, 7 Ha. 101, 1 McN. & G. 541; *Moore v. Morris*, 4 Drew. 33).

I DECLARE that it shall be lawful for my trustees and executors to permit my said wife to take, at a valuation to be made in such manner as my trustees and executors shall think fit, all or any part or parts of the furniture, plate, linen, china, glass, printed books, pictures, prints, musical instruments, and other effects of the like nature of which I shall die possessed, and to accept such personal security by bond or promissory note of hand or such other security for the payment of the amount of such valuation, either with or without interest, by such instalments and at such time or times, and in such manner, as my trustees and executors shall think fit, without incurring any responsibility by reason thereof.

Furniture.
Power to executors to sell to wife, and to accept security for purchase money.

I GIVE all my household furniture and all my plate, linen, pictures and books to my said trustees [*names*], UPON TRUST to permit my said wife to have the personal use and enjoyment thereof during her life; and after her decease, UPON TRUST to sell and convert the same into money, and pay or divide the clear money arising therefrom, to or amongst such of my children as shall be living at the decease of my said wife, and if more than one, in equal shares: PROVIDED, nevertheless, that if at the decease of my said wife, such of my children as shall be then living, or the major part of them, shall have attained the age of twenty-one years, and shall signify to my trustees the desire of such children, or the major part of them, that my said furniture, plate and other articles hereinbefore bequeathed, shall not be sold, but shall be divided *in specie*, then the same shall be accordingly divided by my trustees [*or*, my trustees or trustee for the time being] (*q*), into as many shares as there are children of mine living at the decease of my said wife, such shares to be as nearly of equal value as may be, and such children shall have the preference in the choice of the respective shares according to priority of birth, and all disputes and differences which shall arise respecting the division of such fur-

Bequest of furniture, plate, &c. to trustees upon trust for wife for life—
to sell—and divide proceeds amongst children.

Proviso, allowing division *in specie*.

(*q*) Where an interpretation clause—similar to those given *ante*, pp. 215, 279, 308, 322, 344, 368—is used, these powers and discretions may be expressed to be vested in “my trustees;” but where no such clause is inserted, then in “my trustees or trustee for the time being,” or “the trustees or trustee for the time being of this my will;” see also *ante*, p. 164.

niture and other articles shall be determined by my trustees [*or, as above*], whose decision shall be final. AND I DIRECT my trustees [*or, as above*] to take an inventory of my said furniture, plate and other articles, and deliver to my said wife a copy thereof, and to retain in their hands another copy.

Bequest to trustees of plate, &c. for unmarried children equally, with survivorship.

I BEQUEATH all my plate [&c.] unto the said — and —, their executors, administrators and assigns, Upon trust to divide the same amongst such of my children as shall not at my decease be or have been married, in shares and proportions as nearly equal in value as may be, such division to be made by my trustees or trustee according to the best of their or his judgment; and if any of such children shall die under the age of twenty-one years, then (*r*) the share or shares, as well accruing as original, of the child or children so dying, shall belong to the others or other of the same children, to be divided between them, if more than one, in manner aforesaid.

Specific legacies;

—time of delivery.

Legacy duty and expenses.

I BEQUEATH the specific legacies following; namely, To my said wife all the wines, liquors, fuel, housekeeping provisions and other consumable stores, which shall at my decease be in or about my then dwelling-house; To my son [*name*] my gold watch, with its appendages; To &c. [*other specific legacies*]; AND I DIRECT the specific legacy hereinbefore bequeathed to my said wife to be delivered immediately after my decease, and the several other specific legacies hereinbefore bequeathed, to be delivered within one calendar month after my decease. AND I DIRECT the legacy duty on, and all the expenses incident to the aforesaid bequests, as well specific as pecuniary, and annuities, to be paid by my trustees and executors out of the moneys to arise from the sale and conversion of my residuary estate.

Word "then."

(*r*) The word "*then*," as commonly interposed between two limitations, is a particle of inference connecting the consequences with the premises, and meaning "in that event," or "if that happens:" it is therefore, in those cases, a word of reasoning rather than of time (2 Jarm. Wills, 499). But in *Gill v. Barrett* (29 Be. 372) the word "*then*," used twice in the same sentence in a will, was construed in the first instance as pointing to the event, and in the second as an adverb of time. And see *Wharton v. Barker* (4 K. & J. 483).

WHEREAS my son John B. owes me the sum of £—— on mortgage of &c.: Now, in case my said son John shall, within eighteen calendar months from the day of my decease, assure the hereditaments comprised in the said mortgage, to the uses, for the purposes, and subject to the powers and provisions of the settlement executed prior to and in contemplation of his marriage with Mary, his present wife (formerly Mary W., spinster), concerning the real estate therein comprised, or such of them as shall be then subsisting or capable of taking effect, I DIRECT my executors to release the same hereditaments from the said sum of £——, and all interest and arrears of interest which may be owing thereon, down to and including the day of the execution of the said assurance; and to concur with my trustees or trustee in assuring the said mortgaged hereditaments in manner aforesaid; but if my said son John shall, for the said period of eighteen calendar months, refuse, neglect, or omit to settle the said mortgaged hereditaments in manner aforesaid, then I direct my executors to recover the said sum of £——, and the interest thereof, or to foreclose the equity of redemption of the same hereditaments; and if the said sum of £—— or any part thereof shall be recovered, I direct my trustees or trustee to invest the same in the purchase of freehold or copyhold messuages or lands of inheritance in possession, and to assure the hereditaments so purchased or foreclosed (as the case may be), to the uses, for the purposes, and subject to the powers and provisions of the said marriage settlement concerning the real estate therein comprised, or such of them as shall be then subsisting or capable of taking effect.

Conditional
bequest.

I DECLARE that all the bequests to my said wife herein contained are given on condition that she shall, within six calendar months after my decease, give and execute a bond under the hand and seal to the trustees or trustee for the time being of this my will in a sufficient penalty, conditioned for the payment unto such obligees or obligee, their or his executors, administrators or assigns, by the executors or administrators of my said wife, within six calendar months after her decease, of the sum of £——, to be held upon the trusts herein declared or referred to of and concerning the same.

Bequest to
wife on con-
dition that
she gives a
bond to ex-
ecutors to
pay £——
within six
months after
her death.

WHEREAS certain trust-moneys, stocks, funds and securities,

Bequest on
condition—

—to release
trustees from
conse-
quences of
breach of
trust.

subject to the trusts of an indenture dated, &c., being the settlement made on my marriage with my said wife (to which trust-moneys, stocks, funds and securities my said wife will become absolutely entitled in the event of her surviving me), have been from time to time invested and disposed of by the trustees of our said settlement, at our request or with our consent or approbation, in investments and purchases not within the terms of the trusts of such settlement, and the same, or other moneys or property hereafter to become subject to the trusts of the said settlement, may, from time to time hereafter, at the like request, or with the like consent or approbation, be invested or disposed of by the trustees or trustee for the time being, on securities, investments or purchases not authorized by the trusts or powers of the said settlement: NOW I DECLARE that all the bequests to my said wife herein contained are on condition that she, her executors or administrators, shall, on the request of the trustees or trustee who may have committed any breach of trust at my request, or with my consent or approbation, or of the representatives of such trustees or trustee, but at the expense of my said wife, her executors or administrators, release such trustees or trustee, their or his heirs, executors or administrators, of and from all actions, suits, accounts, claims and demands at law or in equity, for or in respect of any breach or breaches of trust, which may have been committed at such request, or with such consent or approbation as aforesaid, or for or in respect of any act or thing in relation to the trusts of the said settlement which I may have in anywise directed, consented to, or acquiesced in.

Legacy to
debtor of
debt secured
by mortgage
and devise of
mortgaged
estate.

I FORGIVE —, of &c., the sum of £—— which he owes me on mortgage of his Dale Estate in the county of W., and all interest and arrears of interest thereon down to and including the day of my decease, and I DEVISE the said Dale Estate unto and to the use of the said —, his heirs and assigns, discharged from the said mortgage.

Legacy to
debtor;

I FORGIVE A. B., of &c., the debt of £—— which he owes me, or so much thereof as shall be owing at my death (s), and

Legacy to
debtor; re-
lease of debt.

(s) In *Eden v. Smyth* (5 Ves. 341), a legatee was held entitled to his legacy discharged from debts owing by him to the testator, upon evidence

all interest and arrears of interest thereon down to and including the day of my death [*or*, and the interest thereon, not exceeding one year's interest, in case so much shall be owing at my death]; and I DIRECT my executors to cancel and deliver to the said A. B. the bond by which the said sum of £—— and interest are secured; AND in case the said A. B. shall die in my lifetime, the same bequest shall take effect in favour of the executors or administrators of the said A. B., for the benefit of his estate, and my executors shall cancel and deliver the said bond to his executors or administrators.

—provision
against lapse.

I GIVE to ——, of &c., ten shares in the —— Railway Company, and if I should not at my death be possessed of such shares, I direct my executors, out of my residuary personal estate, to purchase ten such shares, and obtain a transfer thereof into the name of the said ——, and I give the same shares to him.

Railway
shares.

I GIVE to ——, of &c., the shares which may belong to me at the time of my death in the several companies mentioned in the schedule (t) to this my will; I DECLARE that the said —— shall have the benefit of any calls or sums of money paid by me in respect of the said shares in anticipation; and that if any calls on the said shares shall be due and unpaid at the time of my death, the same calls and all interest thereon shall be paid by my executors out of my general residuary estate. I further declare that the said —— shall be liable to pay all calls falling due after the day of my death in respect of the said several shares, and shall exonerate my estate therefrom.

Legacy of
shares; di-
rections as
to calls.

I GIVE to ——, of &c., the sum of £—— Three per Cent. Consolidated Bank Annuities, now standing in my name in the

Stock legacy.

from the testator's accounts and unattested memoranda in his writing. But see *Chester v. Urwick* (23 Be. 404), as to the effect of such memoranda in releasing a debt.

(t) Schedules, as they would relieve the body of the will from much matter which interferes with the continuity of the instrument, might often be usefully adopted in the preparation of wills. But care should be taken that the signature of the testator is underneath or follows the schedules. See p. 101, n. (a).

Schedules.

books of the Governor and Company of the Bank of England; and in case I should not have any such stock, or any such stock to that amount, standing in my name at the time of my decease, I DIRECT my executors, out of my personal estate, to purchase, in the name of the said [*legatee*], the sum of £—— like annuities, or so much of the same annuities (as the case may be) as will make up that sum, which I hereby give to the said [*legatee*].

Specific
legacy;
stock.

I GIVE to ——, of &c., as a specific legacy, the sum of £—— Three per Cent. Consolidated Bank Annuities, now standing in my name in the books of the Governor and Company of the Bank of England (*u*).

Shares.

I GIVE to ——, of &c., as a specific legacy, my twenty shares, numbered 10—29, both inclusive, in the —— Life Assurance Company (*u*).

Solicitor's
books, drafts
and papers.

I GIVE to my son —— all my law books, books of account, and business drafts, papers and documents, and the safes, boxes, cupboards and bookcases in which they shall be deposited at my death; subject, nevertheless, as to the said business drafts, papers and documents, to the paramount right of any person or persons to order and direct the disposition thereof respectively.

Bequest of
share in
brewery.

I GIVE unto my said son Henry —— all that my share and interest of and in the brewery and premises situate at —— aforesaid, carried on by him in his own name alone, but in fact in partnership with me, and of and in the plant (*x*), machinery,

Ademption.

(*u*) As to the liability of these legacies to ademption, and the consequent loss by the legatees of all benefit from the legacies, see 2 Wms. Exors. 1228. And as to the circumstances which constitute ademption of specific legacies of choses in action, see *Jones v. Southall* (32 Be. 31).

Plant.

Goodwill.

(*x*) As to the word "plant," see *Wood v. Gaynon* (1 Amb. 394); as to what is comprised in a bequest of "the plant and goodwill" of a business, *Blake v. Shaw* (Joh. 732); that the legatee of the share of a deceased partner in the mere goodwill cannot support a bill against the surviving partner to obtain the benefit of his legacy, see *Robertson v. Quiddington* (28 Be. 529); and as to a trade-mark being partnership assets, see *Hall v. Barrows* (3 N. R. 259).

Trade-mark.

fixtures, utensils, stock, book debts, goodwill and effects connected therewith; but this bequest is not to include any public-houses or other property separate and distinct from the said last-mentioned brewery, though held by my said son and myself in connexion therewith.

I GIVE the share in the business of —, carried on by me in partnership with —, of or to which I shall be possessed or entitled at the time of my death, to my said trustees [*names*], UPON TRUST to continue and carry on the same, until the determination of the partnership term by effluxion of time or otherwise, and I DIRECT that the profits and proceeds of the said share shall be applied by my trustees as part of the annual income of my residuary personal estate; and I FURTHER DIRECT that on the determination of the said term, by effluxion of time or otherwise, my share for the time being of and in the said partnership property and effects, and the goodwill thereof, shall be assigned to my eldest son John —, his executors, administrators and assigns, in consideration that he or they shall thereupon pay to my trustees such a sum of money as shall then be the excess of the value thereof (to be ascertained as hereinafter mentioned) above the sum of £5,000, with interest on such excess at the rate of five per cent. per annum, computed from the determination of the said term (*y*). And I DIRECT that the value of my said share shall be determined by the award of three disinterested persons, or of any two of them; one of such persons to be chosen by my trustees other than my said eldest son, one other of them by my said eldest son, and the third by such two persons so chosen; And that, in determining such value, nothing shall be charged for the goodwill of the said business. And I direct that the sum of money so to be paid by my said eldest son as aforesaid shall go and be applicable as part of my residuary personal estate.

Bequest of share in partnership concern.

Valuation.

Goodwill.

I DIRECT that in case any one of the said legatees, A., B., C. and D., shall become a bankrupt, or shall do or suffer any act or thing whereby the said rents, profits and annual income, or his interest therein, or any part thereof, shall be charged or

Provision in case of bankruptcy of legatees.

(*y*) For a power to accept security and payment by instalments from the legatee, see *ante*, p. 362.

incumbered, or in case, by his own act or by operation of law, the same rents, profits and annual income, or any part thereof, if vested in any one of the same legatees for his life, would become vested in or payable to any other person or persons, which shall first happen, my trustees or trustee shall, during the residue of the life of each legatee whose interest shall have so determined, apply the parts of the said rents, profits and income, to which such legatee would have been entitled, as the same shall from time to time be received, for or towards the maintenance of such of the children of the said legatee, or (where children and other objects are to take together in one class) of such children and other objects, or any of them, as shall be then in existence, and who would be entitled to the same parts of rents, profits and income, in case such legatee were then dead without having exercised his testamentary power of appointment (z). AND in case, and during every period whilst,

As to the
time at which
a power may
be exercised.

*Haswell v.
Haswell.*

(z) A power in gross which is conferred on the donee in general terms may be exercised by him at any time during his life, even though a present interest in possession be given to the objects of the power, subject to the donee's distribution (*Coleman v. Seymour*, 1 Ves. s. 209), and notwithstanding that the donee takes no interest in the appointable fund, or that his interest therein has ceased (*Parsons v. Parsons*, 9 Mod. 464). But the power may be conferred in terms which restrict its exercise to the duration of the donee's interest in the fund; thus in *Haswell v. Haswell* (28 Be. 26), by a post-nuptial settlement a fund was settled in trust for the husband for life or until insolvency, remainder to the separate use of the wife for life, remainder to their children or issue as the survivor of the husband and wife should appoint, and in default of appointment from and after the several deceases of the husband and wife, "or the sooner determination of the interests" thereinbefore limited to them respectively, in trust for the children then living and the issue then living of children then deceased; the husband became insolvent, and the wife afterwards died, leaving the husband surviving her; the Master of the Rolls held that the power was not exerciseable by the surviving husband, but that the fund was divisible as in default of appointment on the death of the wife, which was "the sooner determination of the interests" given to the husband and wife. This decision was affirmed by Lord *Campbell*, C., (2 D. F. & J. 456). The Master of the Rolls considered the words of the deed "distinctly to express that the power to appoint was given to the husband and wife and the survivor, but if it were not exercised before the determination of the interests of the husband and wife," the fund was divisible as therein provided in default; and the Lord Chancellor also thought that, in that settle-

there shall not be any such child or other object for the time being in existence, then I direct my trustees or trustee to apply the same parts of the rents, profits and income, to which each such legatee would have been entitled in case his interest had not determined, equally between such of the others of the said A., B., C. and D., as shall be then living and whose interest shall not have determined, when the respective payments of rents, profits and income, payable in like manner, shall be made.

I DIRECT my trustees to invest the said sum of £—— [*a* *Trusts of pecuniary legacy : —to invest;*
legacy with interest previously given to the trustees], when received, in the public stocks or funds, or on mortgage of freehold, copyhold or leasehold estates, or upon other Government or real securities in England (but not elsewhere, and not in or upon any other kind of security), with power from time to time to transpose such investments into others of the like nature, and to stand possessed of the said sum, and the securities for the same (hereinafter referred to as the said trust fund), upon the trusts following; namely, UPON TRUST to pay the annual income arising therefrom unto my niece C. C., the wife of T. C., of &c., during her life, for her separate use, free from marital control, and without power of anticipation; and, after her death, in case
—to pay income to niece for life; restrained from anticipation.

ment, “although the power of appointment by deed or will was given to the husband and wife or the survivor of them, there was a clear indication that this power was to be exercised while the interest of the husband or of the wife continued.” The learned Judges do not appear to have given sufficient consideration to the fact that the power was given (not to husband and wife and the survivor, but) only to the survivor of the husband and wife, and consequently did not arise until the death of one of them—a fact which appears to be very material; the husband’s interest ceased on his insolvency, but the power of appointment had not then arisen, and even if it had would not have been extinguished by the cesser of interest (*Parsons v. Parsons, supra*); the settlement contemplated the event of the cesser of the husband’s interest, but nevertheless gave the power simply to the survivor of the husband and wife, whichever it might be—a power which could not be exercised by the husband unless and until he became the survivor; the Court, however, decided that the power itself ceased when the husband became the survivor, or, in other words, struck out of the settlement the power to the husband as survivor in the event of his insolvency. See this case commented on in Sugd. Pow. 261; and see *Wickham v. Wing* (2 H. & M. 436).

Remarks on
Haswell v.
Haswell.

As to interest
until invest-
ment of
legacy ;

—subject as
above,
—for chil-
dren equally.

If no child,
to form part
of the resi-
due.

she shall by her will so direct, Upon trust to pay the whole or any part of such annual income unto her present or any other husband whom she may leave surviving her, during his life, or for any shorter period. AND I DIRECT that, until the said sum of £ — shall be received and invested as aforesaid, the interest payable in respect thereof shall be applied in like manner as is hereby directed concerning the annual income of the said trust fund: AND subject as aforesaid, as to as well the capital as the annual income of the said trust fund, UPON TRUST for all the children equally, if more than one, or for the only child, if but one, of my said niece, who either before or after the death of my said niece, being sons or a son, shall attain the age of twenty-one years, or, being daughters or a daughter, shall attain that age or be married. AND in case there shall not be any such child, then I direct that the said trust fund, or so much thereof as shall not have been applied under the provisions [*for maintenance, &c.*] hereinafter contained, shall form part of the residue of my estate.

Exclusive
power of ap-
pointment to
children, or
issue, or
children and
issue.

UPON TRUST FOR ALL AND EVERY or such one or more exclusively of the other or others of the children of the said [*name*], or for all and every or such one or more exclusively of the other or others of the issue of the same children (such issue being born in the lifetime of the said [*name*], or within twenty-one years after her death,) [*or, such issue being born in the lifetime of the survivor of the said —, —, and —, or within twenty-one years after the death of such survivor*], or both (*a*) for all and every or such one or more exclusively of the other or others of the children of the said [*name*] and for all and every or such one or more exclusively of the other or others of the issue of the same children (such issue, &c., *as before*) as the said [*name*] shall by deed or will appoint.

Testamentary
appointment
of trust funds
in execution
of a power
contained in a
former will.

WHEREAS under the will of my late wife M., deceased, or otherwise, I have, in the event of there not being any child of mine by her living to acquire the absolute vested interest in certain trust moneys or property comprised in the settlement made in contemplation of my marriage with her, a power of

disposing of such trust-moneys or property in such manner as I may think proper: Now I DO HEREBY, in execution of all powers and authorities enabling me in this behalf, appoint and bequeath all trust-moneys and funds over which I have or eventually may have, by virtue of the same will or otherwise, any power of appointment or disposition, to the said [*trustees*], Upon the same or the like trusts, and subject to the same or the like provisions and declarations, as are hereinbefore expressed and declared concerning my residuary personal estate, or as near thereto as may be.

IN EXERCISE of the power reserved to or vested in me by the settlement executed in contemplation of my marriage with Mary, my late wife, I hereby bequeath the sum of £5,000 comprised in the same settlement, amongst my children by her (of whom I have seven only) in manner following, that is to say, as to the sum of three shillings, part thereof (*b*), to my sons, John B., William B., and James B., equally; and as to the residue of the said sum of £5,000 to my four daughters, Mary B., Jane B., Sarah B., and Elizabeth B., in equal shares, as their separate property, free from marital control.

Appointment (under a particular power) to children.

I DEVISE all &c., TO THE USE of my children, if more than one, equally, or my child, if only one, wholly, in fee simple, With cross limitations of the shares, original and accruing, of

Devise to children in fee, with cross executory limitations in fee.

(*b*) Formerly, where a person had a power of appointing property, real or personal, amongst a class (and such power was not an exclusive power), although the donee had a full discretion as to the amount of the shares of the respective objects, and although any appointment that included all the objects was valid at law, yet if the donee exercised the power by appointing to one or more a nominal share, or what was not (having regard to the amount to be distributed) considered a substantial share, equity interfered, and set aside the appointment as illusory. The old doctrine applies to appointments made before the 16th July, 1830; see the Appendix to Sugd. Pow. 938; and the notes to *Aleyn v. Belchier* (1 Wh. & Tud. L. C. Eq. 319). The difficulty was to determine what in each case constituted a substantial share, and the rule of equity produced so much inconvenience and litigation, that by the 11 Geo. 4 & 1 Will. 4, c. 46 (commonly known as *Preston's Act*, but for which Lord *St. Leonards* is responsible; see Sugd. Pow. 449; 30 Be. 394); illusory appointments were made valid in equity as well as at law, notwithstanding that any one or more of the objects take only a nominal share.

Illusory appointments.

11 Geo. 4 & 1 Will. 4, c. 46, *Preston's Act*.

each of the said children dying under the age of twenty-one years without leaving issue living at his or her death, To the use of the others equally, or the other wholly, of the said children in fee-simple.

Specific devise and bequest of freeholds and leaseholds.

I DEVISE and bequeath unto my said trustees [*names*], ALL that my freehold estate situate &c., AND ALL that piece of leasehold &c., held by me for the residue of a term of 99 years, granted by the late —, and being part of a tract of land called — (but subject as to — acres, part thereof, to a lease, dated, &c., granted to —), TO HOLD the said freehold and leasehold premises (c) unto and to the use of my said trustees, their heirs, executors, administrators and assigns respectively, but subject to and charged exclusively in exoneration of my other estate with the payment of the mortgage debt of £2,000 and interest charged on the same leasehold premises, or so much thereof as shall remain due at my decease, and also, as to both the said freehold and leasehold premises, subject to and charged exclusively in exoneration of my other estate with the payment by my said eldest son of the sum of £3,000 and interest for the same at the rate of four per cent. per annum computed from my decease, the first payment thereof to be made on the expiration of six calendar months next after my decease. And I direct that in case my said eldest son, his executors, administrators, or assigns, shall duly pay such interest as last mentioned, by equal half-yearly payments, on or within thirty days next after the said half-yearly days respectively, then and in such case my trustees shall not require payment of the said sum of £3,000 until the — day of —, AND I direct that the said sum of £3,000 and the interest thereof shall be applied by my said trustees as part of my residuary personal

Election, bequest *cum onere*.

(c) Where a testator makes several bequests to a devisee, one of which is clogged with a burden created by the testator, it is a question of intention, to be gathered from the will, whether the devisee must elect to take all or none of the gifts, or whether he may accept the beneficial gifts, and repudiate the burdensome one. Thus, where A. bequeathed a legacy to B., devised freeholds to B. and his wife for life with remainder over, and after various intervening gifts bequeathed leaseholds to B., it was held that B. might accept the legacy and freeholds, and repudiate the burdensome bequest of the leaseholds (*Warren v. Rudall*, 1 J. & H. 1; *Long v. Kent*, 6 N. R. 354).

estate, AND subject to and charged with the said sums of £2,000 and £3,000, and the interest thereof respectively, I direct that the said freehold and leasehold premises shall be held by my trustees upon the trusts following, that is to say, UPON SUCH TRUSTS, for such estates or interests and in such manner in all respects, as my said eldest son shall by any deed or deeds or by his last will appoint, so only that every such appointment be made in favour of some one or more of his children or other issue born in his lifetime; and in default of and until such appointment, UPON TRUST to pay the rents and annual proceeds thereof unto my said eldest son and his assigns during his natural life; and after his decease, As to the same freehold and leasehold premises respectively subject as aforesaid, UPON TRUST for the child, if only one, or all the children equally, if more than one, of my said eldest son, who, either before or after his decease, being a male or males, shall attain the age of twenty-one years, or being a female or females shall attain that age or be previously married; but no child of my said eldest son, in favour of whom or of whose issue an appointment shall be made under the power last aforesaid, shall participate, under the trust last hereinbefore contained, in the unappointed share of the said freehold and leasehold premises, without bringing the benefit of such appointment into hotchpot, AND in case there shall not be any child or issue of my said eldest son who shall attain a vested interest under the powers or trusts aforesaid, then I DIRECT that, subject to the powers for maintenance and advancement hereinafter contained, the said freehold and leasehold premises shall go and be considered as part of my residuary estate, and be held upon the trusts thereof.

Hotchpot.

I DEVISE and bequeath all my leases for lives of any lead or other mines or minerals, and all contracts and agreements respecting any lead or other mines or minerals, and all my personal estate not hereinbefore otherwise disposed of, (subject to the payment of my debts, and funeral and testamentary expenses, and the said legacy of £—— to my said wife, and of any deficiency of the annual income of my real estate in payment of the said additional annual sum or yearly rent of £—— bequeathed to her,) to my son or other descendant who shall

Bequest of leaseholds and personalty to first son, &c. entitled to the possession of settled freehold estate.

first within the period of twenty-one years after my decease be of the age of twenty-one years and entitled to the said hereditaments and premises comprised in the said settlement, in remainder or reversion immediately expectant on the determination of the said term of 500 years.

Devise of real estate to trustees upon trust; to permit wife to occupy house during her widowhood;

I DEVISE all, &c. — unto and to the use of —, of &c., their heirs and assigns, upon the trusts following (that is to say), UPON TRUST to permit my said wife [*name*], if she shall continue my widow, and such of my daughters as shall from time to time be spinsters, to have the personal use, occupation and enjoyment (so long as they or any one or more of them shall think fit personally to dwell in the same) of the messuage or tenement now in the occupation of B., with the gig-house and room over the same, together with the washhouse, [&c.,] and the garden behind the said messuage; together with the free use of the pump and water in the yard of my present dwelling-house, and with liberty to pass and repass to and from the said messuage and premises, the use and enjoyment whereof is hereinbefore given to them, through, over and along the yard of my said present dwelling-house, to and from the public road or street, now called — street, my said wife and daughters, or such of them as shall so use, occupy and enjoy the said premises, maintaining and keeping the same, during such their or her use, occupation and enjoyment thereof, in good tenantable repair and condition, to the satisfaction of the trustees or trustee for the time being of this my will. AND as to all the said hereditaments and premises hereinbefore devised, subject and without prejudice, as to part thereof, to the trusts hereinbefore contained in favour of my said wife and daughters, UPON TRUST, during the minority of my son W. B., to let the same several hereditaments and premises, for any term or terms not exceeding — years, at the best and most improved yearly rent or rents, and to receive the rents, issues and profits of the same hereditaments and premises, and thereout, in the first place, to pay and satisfy all the costs, charges and expenses of insuring the same against loss or damage by fire, and of maintaining and keeping the same in good tenantable repair and condition, and all other incidental outgoings and expenses; and, in the next place, to apply such annual sum or sums as my trustees or trustee for the

—to let, and manage, during the minority of son.

time being shall think expedient, in or towards the maintenance and education or otherwise for the benefit of my said son W. B., in such manner as my said trustees or trustee shall judge most beneficial, and to dispose of the residue or surplus (if any) of the same rents, issues and profits as part of my residuary personal estate. AND subject thereto, UPON TRUST for my said son W. B., his heirs and assigns.

TO THE USE of my eldest son [*name*], and of every other son of mine, and of their respective issue male, so that every elder son and his issue male be preferred to and take before every younger son and his issue male, and that my grandsons respectively, with their respective issue male, take in succession and according to their respective seniorities: and so that every such son and every such grandson who shall be begotten in my lifetime take an estate for his life without impeachment of waste, with remainder to his first and every subsequent son successively, according to seniority, in tail male, and that every such grandson who shall be begotten after my decease take an estate in tail male.

Devise to
uses in strict
settlement.

TO THE USE of the said A. B. and his assigns, during his life without impeachment of waste: AND immediately after the determination in his lifetime of the estate hereinbefore limited to him, TO THE USE of the said C. D. and E. F., their executors and administrators, during the life of the said A. B., UPON TRUST to preserve the contingent remainders (*d*) hereinafter limited, but to permit the said A. B. and his assigns to receive the rents and profits of the said hereditaments and premises: AND immediately after the decease of the said A. B., TO THE USE of the first and every other son successively of the said A. B., in remainder one after another, and the heirs of the body of each such son, every elder son and the heirs of his body taking before every younger son and the heirs of his body:

Limitation
for life, re-
mainder to
the first and
other sons of
life-tenant in
tail, remain-
der to his
daughters as
tenants in
common in
tail, with
cross-remain-
ders between
them.

(*d*) The limitations to preserve contingent remainders are given in this form, to be used in case it should be thought necessary, for any of the reasons previously referred to (*ante*, pp. 381—384), that they should be retained. This and the six precedents next following are taken, with some variations, from Hayes "On Limitations to Heirs in Tail."

AND on failure of such issue, To THE USE of the daughter of the said A. B., if only one, or all the daughters of the said A. B., if more than one, to take in equal shares, as tenants in common, and the heirs of the body or respective bodies of such daughter or daughters: AND on failure of the issue of each of the said daughters, as to as well the share hereinbefore limited to her as the share or shares limited to her by this limitation of cross-remainders, To THE USE of the other, if only one, or the others, if more than one, of the said daughters, and if more than one, to take as aforesaid, and the heirs of her or their body or respective bodies: AND on failure of such issue, To THE USE of the said A. B., his heirs and assigns for ever.

Equitable limitations to a son *in esse* and every after-born son of the testator for life, with legal remainders to the heirs in tail of each such son, and a proviso determining the life interest on bankruptcy or alienation.

To THE USE of the said A. and B., their executors and administrators, during the life of my said son C., UPON TRUST to preserve the contingent remainders hereinafter limited, but to permit the said C. and his assigns to receive the rents and profits of the said hereditaments during his life, subject to the proviso hereinafter contained: AND immediately after the decease of the said C., To THE USE of the heirs male of the body of the said C.: AND on failure of such issue, To THE USE of the heirs of the body of the said C.: AND on failure of such issue, To THE USE of the said [*trustees*], their executors and administrators, during the life of every son of mine hereafter to be born, UPON TRUST to preserve the contingent remainders hereinafter limited to the issue of every such son, but to permit the same son to receive the rents and profits of the said hereditaments during his life, subject to the proviso hereinafter contained, With remainder To THE USE of the heirs male of the body of every such son, With remainder to the use of the heirs of the body of every such son, in such order that the trust and uses in favour of every elder son and his issue shall precede the trust and uses in favour of every younger son and his issue: AND on failure of such issue, To THE USE, &c.: PROVIDED that if the said C., or any son of mine hereafter to be born, shall become bankrupt, or shall do or permit any act or thing whereby the rents and profits of the said hereditaments, or any part thereof, shall or may be aliened or incumbered, then the trust hereinbefore contained for the payment of the rents and profits of the said hereditaments to such son shall thenceforth cease,

and such rents and profits shall, during the remainder of the life of the same son, be received and enjoyed by the person or persons for the time being next beneficially entitled in remainder or reversion expectant on the decease of such son.

TO THE USE of the said A. and his assigns, during his life : AND from and after his decease [*or*, for the term of one hundred years, to be computed from my decease, if he shall so long live (*e*), and immediately after the expiration or sooner determination of the same term], TO THE USE of the first son born in my lifetime of the said A., and the assigns of such son during his life ; AND immediately after his decease [*or*, TO THE USE of the first son, &c., and the assigns of such son, during the term of one hundred years, if he shall so long live, and immediately after the expiration or sooner determination of the same term], TO THE USE of such son's first and every other son successively in remainder, one after another, and the heirs male of the body of each such last-mentioned first and every other son, the elder and the heirs male of his body taking before the younger and the heirs male of his body ; And on failure of such issue, TO THE USE of the second and every subsequent son born in my lifetime of the said A., for the life of each such son [*or*, for the term of one hundred years, if such son shall so long live], with remainders TO THE USE of such son's first and every other son successively, in tail male, in manner hereinbefore expressed with respect to the said A.'s first son and his issue male, every elder of such second and other sons, and his issue male, taking before every younger son and his issue male : And on failure of such issue, TO THE USE of the first and every other son born after my decease of the said A., and the heirs male of the body of each such son, every elder son and the heirs male of his body taking before every younger son and the heirs male of his body : AND on failure of such issue, TO THE USE of the said A. and the heirs of his body : AND on failure of such issue, TO THE USE of my own right heirs for ever.

Limitation for life, remainders to the first and other sons of life-tenant born in testator's lifetime for life ; remainders to such sons' first and other sons in tail male ; remainder to after-born sons in tail male ; remainder to first tenant for life in tail ; reversion to testator's right heirs ; [with variations substituting a term of years determinable on life for the life estate].

TO THE USE of the said A. and his assigns, during his life : AND immediately after his decease, TO THE USE of the said D., his wife, and her assigns, during her life : AND immediately

Limitations to husband and wife for their successive lives,

(*e*) See *Coape v. Arnold* (2 S. & G. 311 D. M. & G. 574).

remainder to
their children
as they or the
survivor
shall appoint;

after her decease, To THE USE of all or any one or more exclusively of the children and (*f*) more remote issue (such issue coming into being in the lifetime of the said A. and D., or the survivor of them), for such estate or estates, in such shares, subject to such limitations, and in such manner in all respects, as the said A. and D., or the survivor of them, by any deed or deeds, revocable or irrevocable, to be executed by them, him or

Appoint-
ment. Chil-
dren and
issue; chil-
dren or issue.

(*f*) It will be observed that this power is in favour of "all or any one or more exclusively of the children and more remote issue;" the commoner form is in favour of "children or more remote issue." The question then arises whether the appointment must not be in favour of children only, or of remoter issue only; in other words, whether an appointment to both children and issue is valid. If the terms of the power were strictly and literally followed, such an appointment would not be valid; but see *Garthwaite v. Robinson* (2 Sim. 43); *Lee v. Okey* (1 Y. & C. Ex. 550); *Penny v. Turner* (2 Ph. 493); from which it would appear that an appointment to children and remoter issue would be held valid. The language of the text prevents the occurrence of this question.

Rule in
Wild's case,

Where there is a devise to a person and his children or issue, and he has no issue at the time of the devise, such person takes an estate tail. This is the rule in *Wild's case* (6 Rep. 16 b). Where, however, there are children at the time of the devise, the parent and children take joint estates for life.

—does not
apply to per-
sonalty.

It has been a subject of much discussion whether the rule in *Wild's case* applies to personalty. In *Re Wynch's Trusts* (5 D. M. & G. 188), where a testator gave an annuity to a married woman "for her life and the issue from her body, on failure of which to revert" to testator's heirs, with a direction to secure the annuity for her separate use—and the annuitant had no children in the testator's lifetime, but had children born after his death—it was held that the Court in construing a testamentary disposition of personalty is not absolutely bound by the rules of law applicable to realty; that the rule, that words which applied to realty would give an estate tail give an absolute interest in personalty, is qualified in the case of gifts of personalty to issue or gifts over on failure of issue; and therefore, that the married woman took for life only, with a gift in the nature of a remainder to her issue as joint tenants. See also *Jackson v. Calvert* (1 J. & H. 235); *Herrick v. Franklin* (L. R., 6 Eq. 593). The most recent decisions are to the effect that the rule in *Wild's case* is not applicable to personalty (*Audsley v. Horn*, 1 D. F. & J. 226); where realty and personalty were to go together, see *Griere v. Griere* (L. R., 4 Eq. 180). See also *Ward v. Grey* (26 Be. 485); *Re Stanhope's Trusts* (27 Be. 201); *Earl of Tyrone v. Marquis of Waterford* (1 D. F. & J. 613), in which case there was a gift of both realty and personalty to "A. and his children in succession;" *Wild's case*, in Tud. L. C., R. P. 581; and *Byng v. Byng* (10 W. R. 633; 10 H. L. C. 178).

her, in the presence of and attested by one or more witness or witnesses, or as such survivor, by his or her last will, shall appoint: AND, in default of appointment, and subject to any partial appointment, To THE USE of the child, if only one, or the children, if more than one, of the said A. and D., and, if more than one, to take as tenants in common in equal shares, and the heirs and assigns of such child or respective children: AND in case any of the said children shall die under the age of twenty-one years without leaving issue living at his, her or their death or respective deaths [*or*, under the age of twenty-one years without having been married, *or*, being a son or sons under the age of twenty-one years, or being a daughter or daughters under that age without having been married], then as to as well the share hereinbefore limited to each child so dying as the share or shares limited to such child by this executory limitation, To THE USE of the other, if only one, or the others, if more than one, of the said children, and if more than one, to take as aforesaid, and the heirs and assigns of such other or others respectively: BUT in case there shall not be any child of the said A. and D., or no such child who shall attain the age of twenty-one years, or who, dying under that age, shall leave issue living at his or her death [*or*, who shall attain the age of twenty-one years or be married, *or*, who, being a son or sons, shall attain the age of twenty-one years, or, being a daughter or daughters, shall attain that age or be married], To THE USE of the survivor of the said A. and D., and the heirs and assigns of such survivor, for ever.

and in default of appointment to the children in common in fee, with cross executory limitations, with an ultimate limitation to the surviving parent in fee.

To THE USE of the said A. and his assigns during his life: And after his decease, To THE USE of — and —, their heirs and assigns, UPON TRUST for the child, if only one, or the children, if more than one, of the said A., who, either before or after his decease (*g*), shall attain the age of twenty-one years, or, dying under that age, shall leave issue living at his, her or their death or respective deaths, such children, if more than one, to take equally as tenants in common, and the heirs and assigns of such child or respective children: AND if there shall not be any child of the said A. who shall attain the said age, or,

Equitable limitation to children in common in fee.

(*g*) See *ante*, pp. 205, 206, as to giving equitable and not legal estates to the children of A.

dying under that age, shall leave issue living at his or her death, UPON TRUST, &c.

Limitations to sons and daughters successively in fee simple, by way of executory use.

TO THE USE of the first son of the said A., and the heirs and assigns of such son: AND if such son shall die under the age of twenty-one years without leaving issue living at his death, TO THE USE of the second and every other son of the said A., according to the order of their respective births, and the heirs and assigns of each such son, in a succession of executory limitations in fee simple, so that the estate of each such son shall, in the event of his death under the age of twenty-one years without leaving issue living at his death, be divested, and go over to his next brother: AND if there shall not be any son of the said A., or not any such son who shall attain the age of twenty-one years, or who, dying under that age, shall leave issue living at his death, then TO THE USE of the first daughter of the said A., &c.

Limitation to children and issue, *per stirpes*, in fee.

TO THE USE of the child or children of the said A., living at his decease, and the issue then living of the child or children of the said A. then deceased, as tenants in common, and the heirs and assigns of such child or children and issue respectively; but so that such issue shall take amongst them the share or shares only which their deceased parent or parents, if living, would have taken: AND if there shall not be any child or issue of a deceased child of the said A., living at his decease, TO THE USE, &c.

Devise of fee simple estate to separate use of a married woman.

I DEVISE all the messuages and hereditaments situate, &c., TO SUCH USES and for such estates as my daughter [*name*], whilst single or discover by deed or will, and whilst covert by will (*h*), shall appoint: AND subject thereto TO THE USE of my trustees [*names*], their executors, administrators and assigns, during the life of my said daughter, IN TRUST for her separate and inalienable use: AND subject thereto, TO THE USE of the person, if only one, solely, or the persons, if more than one,

Separate estate.

Curtesy.

(*h*) The creation of the power of appointment prevents all doubt as to the married woman's capacity to dispose of the fee simple. *Vide ante*, p. 144. In *Appleton v. Rowley* (V.-C. *Malins*, 10 March, 1869), where real estate was devised to a married woman in fee simple, for her separate use, it was held that the husband was entitled to curtesy.

equally, in fee simple, who at my said daughter's death would be entitled to the said messuages, hereditaments and premises by descent, in case she had died intestate and seised thereof in fee simple by purchase. AND I EMPOWER the said [*trustees*] or the survivor of them, or other the trustees or trustee for the time being of this my will, at any time or times during the coverture of my said daughter, with her consent in writing, to demise all or any of the said messuages and hereditaments at rack-rent from year to year or for any term not exceeding twenty-one years in possession.

Power to lease.

TO SUCH USES, for such estates, and with and subject to such powers and provisions as under or by virtue of the said will of — [*or*, of an indenture of settlement dated &c. and made between &c.], and all mesne assurances, acts and operations of law, shall at the time of my death be subsisting and capable of taking effect of and concerning the hereditaments comprised in the same will [*or*, settlement] (*i*).

Devise to uses by reference.

AND WHEREAS it is my desire that the entail created by my will may be prevented from being barred or destroyed so long as the rules of law will permit, I THEREFORE HEREBY NOMINATE and appoint [*names*] to be protectors (*j*) of the estate tail created by this my will, during the continuance of the estate or respective estates for life for the time being prior or antecedent to such estate tail, with all such discretionary powers, authorities and privileges (*k*) as are annexed to the said office of protector: PROVIDED always, and I hereby declare, that in case any [*or*, either] of the said [*protectors*], or any protector or protectors

Appointment of protectors of estate tail.

Power of appointment of new protectors.

(*i*) Where property is devised or bequeathed to uses or on trusts by reference, it is usual to add words to the effect that charges or powers of charging are not thereby to be increased or multiplied. Cases may occur where such words would be necessary. But trusts by reference are not, generally speaking, to be so read as to create a multiplication of charges (*Hindle v. Taylor*, 5 D.M. & G. 577; *Boyd v. Boyd*, 2 N.R. 486). That reference to trusts does not necessarily include all the powers given to the trustees, see *Cox v. Cox* (1 K. & J. 251).

Trusts by reference. Multiplication of charges.

(*j*) The number of appointed protectors must not exceed three; they must be persons *in esse*, and not aliens. See 3 & 4 Will. 4, c. 74, s. 32; 4 Dav. Conv. by Waley, 492; *Bankes v. Le Despencer* (11 Sim. 508).

Protectors. 3 & 4 Will. 4, c. 74.

(*k*) The protectorship is an irresponsible office, and the protector may sell his concurrence in the barring or destruction of the entail (3 & 4 Will. 4, c. 74, s. 36).

to be appointed as hereinafter mentioned, shall die or be desirous to relinquish the office of protector (*l*), then, and in every such case, it shall be lawful for the surviving or continuing protectors or protector for the time being, or if there shall not be any such then for the protector or protectors so relinquishing the office as aforesaid, if he or they shall be willing to exercise this power, and if also none such, then for the acting [*or*, proving] executors or executor for the time being, or the administrators or administrator for the time being, of the last deceased protector, by any deed or deeds to be enrolled in Chancery, to nominate and appoint one or more person or persons, not being tenant for life (*m*) in possession for the time being of the hereditaments hereinbefore devised and appointed, to be a protector or protectors in the room of the person or persons who shall so have died or relinquished the office as aforesaid; and the person or persons so to be nominated and appointed as aforesaid shall have and may exercise, either in conjunction with the surviving or continuing protector or protectors, or solely (as the case may be), the same powers, authorities and privileges in every respect as he or they might have exercised, or would have had and enjoyed, if he or they had been hereby appointed a protector or protectors of the said estate tail.

Devise of
lands con-

AND WHEREAS I have lately contracted to sell (*n*) to —, for the sum of £—, my freehold estate situate at —, I

Protectors.

3 & 4 Will 4,
c. 74.

(*l*) The power of appointment of new protectors is authorized only in the cases of death and relinquishment by deed. In other cases the vacancies are supplied by the Act itself. The deed of new appointment must be enrolled within six calendar months after execution.

(*m*) If the owner of the prior estate for life is made a protector, the office might, by the death or retirement of his colleagues, become vested solely in him. In such a case he ought to be prohibited from acting as protector; the effect of which would be that the Court of Chancery would be protector, until the vacancy was supplied under the power.

Devise of
lands con-
tracted to be
sold.

(*n*) A devise by a testator of an estate which he "lately contracted to sell to M.," has been held to be a devise of the legal estate, merely to enable the devisee to carry out the contract, but not so as to entitle the devisee to the purchase-money (*Knollys v. Shepherd*, cited 1 J. & W. 499). It is conceived, however, that if the purchase had not been completed, the devisee in the above case would have been entitled to the land. As to lands specifically devised, and subsequently sold, see note to sect. 23, *ante*, p. 42.

hereby devise the same estate (subject to the said contract) to A. B., his heirs and assigns: AND in case the said contract shall be carried into execution, then I give to the said A. B., his executors, administrators and assigns, the said sum of £ — purchase-money which I or the executors of my will shall receive for the same. And I direct that the costs incident to the said contract for sale, whether the same be completed or not, be borne by my residuary personal estate.

tracted to be sold.

If sold, purchase-money instead.

I DEVISE all &c. [*to uses*]: PROVIDED ALWAYS that if at the time of my death I shall have sold and conveyed the said estate, or any part thereof, the trustees or trustee for the time being of my will shall invest the sum of £ —, or a proportionate part thereof, to be fixed by the said trustees or trustee in their or his discretion, upon trusts corresponding as nearly as may be with the uses hereinbefore declared concerning the said estate.

Gift of money in lieu of estate, if sold.

AND WHEREAS I have contracted with —, of —, for the purchase of certain freehold hereditaments at —, I hereby direct and authorize my trustees or trustee to complete such purchase or to relinquish the same as circumstances may require, and as they or he in their or his discretion shall think best: AND I authorize my trustees or trustee to accept such a title

Contract to purchase. Discretion in trustees to complete.

From the moment of entering into an agreement for sale, the vendor becomes in contemplation of equity a trustee for the purchaser; he is, however, a trustee *sub modo* only, *i. e.* provided nothing happens to prevent the performance of the contract. See *Wall v. Bright* (1 J. & W. 494), where a testator who had contracted for the sale of an estate devised all his lands to trustees upon trust to sell, with power to give discharges to purchasers, and it was held that the land contracted to be sold passed by the devise (but see the remarks on that case, 1 Jarm. Wills, 670); see also *Purser v. Darby* (4 K. & J. 41): the purchase-money in such a case would, however, be payable, not to the trustees by virtue of the devise, and notwithstanding the power to give discharges, but to the executors, as part of the general personal estate of the testator (*Eaton v. Sanxter*, 6 Sim. 517). But if the purchase-money has been paid and possession of the estate delivered, then the vendor is in the position of a mere trustee for the purchaser, even though the legal estate has not been actually conveyed. And in such a case the legal estate would pass by a devise of trust estates, but not by a general devise in a mode inconsistent with the passing of trust estates.

Devise of lands contracted to be sold.

(whether strictly marketable or not) to the said hereditaments as they or he shall deem it prudent to accept, and, if they or he shall think fit, to waive any objections and requisitions, and to dispense with any inquiries and evidence, which they or he may be entitled (and but for this authority would be bound) to insist on, make or require.

Devise of
estate con-
tracted to be
purchased.

I DEVISE unto A. B. of —, his heirs and assigns, the freehold estate situate at —, which I have contracted to purchase (o) for the sum of £—, from Mr. —, of —; which sum if unpaid at my death is to be paid out of my personal estate; And in case a good title to the said estate cannot be made, I direct my said executors to lay out and invest the sum of £— in the purchase of freehold, leasehold or copyhold messuages, lands and hereditaments in such part of England as the said A. B., his heirs or assigns, shall choose, and by writing under his or their hands direct. AND I DIRECT that upon payment by my said executors of the said sum of £—, such hereditaments so to be purchased as aforesaid shall be conveyed and assured unto and to the use of the said A. B., his heirs, executors, administrators and assigns respectively, according to the tenure thereof, in lieu of the said estate which I have contracted to purchase as aforesaid.

Trusts for
children as
parents shall
appoint; in
default, as
survivor
shall ap-
point; in de-
fault, for
children
equally.

TO AND FOR such uses, estates, intents and purposes, and in such manner, and subject to such charges, powers, and provisions, for the benefit of all or any one or more of the issue of my said sister [name], whether children, grandchildren, or more remote issue, born in her lifetime, as she the said [name] and [name] her husband at any time or times, by deed, with or without power of revocation and new appointment, to be executed by them in the presence of, and to be attested by, two or more witnesses, shall jointly appoint, or as the survivor of them, after the death of either of them (p), shall in like manner or by his or her last will appoint. AND in default of

30 & 31 Vict.
c. 69, s. 2.

(o) See *Morgan v. Holford*, 1 S. & G. 101; *ante*, p. 4; *Nugee v. Chapman*, 29 Be. 288. In the absence of a direction to the contrary, the purchase-money would not now be payable out of the testator's personal estate; see 30 & 31 Vict. c. 69, s. 2, which Act (it may be observed) extends only to testators, not to intestates.

(p) See *Thomas v. Jones*, *ante*, pp. 9, 46; *Cave v. Cave*, *ante*, p. 45.

and subject to any and every such appointment, To THE USE of an only child, or all the children of the said [*sister*], whether born before or after my death, if more than one, as tenants in common, in equal shares, and the respective heirs and assigns of such child or children as aforesaid: But if any of such children born in my lifetime shall die without leaving issue living at his, her, or their death, or respective deaths, then as to the share or shares of the child or respective children so dying, as well original as accruing under this limitation, To THE USE of the other child or children of the said [*sister*], and if more than one, as tenants in common, in equal shares, and the heirs and assigns of such other child or respective children: BUT if no child of the said [*sister*], born in my lifetime, shall leave issue living at his or her death, or no child of my same sister, born after my decease, shall attain the age of twenty-one years, or, dying under that age, shall leave issue living at his or her decease: Then, notwithstanding any appointment to be made in exercise of the power hereinbefore given to the said [*sister*] of appointing to children and issue, and so that as well the estates and interests to be created by any exercise of such power as the estate and interests hereinbefore limited in default of appointment, may be defeasible by this executory limitation over, To THE USE, &c.

Accruer, on death of children without issue, in favour of the others or other.

Executory gift over,

I DIRECT that my sons, successively, and according to their respective seniorities, shall have the option of purchasing, in one lot, the real and leasehold estates belonging to me at the time of my death, situate in the parish of —, at a valuation to be made by two competent valuers, to be appointed by my trustees or trustee, or, if such valuers shall disagree, by a third valuer, to be appointed in writing by the said two first-named valuers, before entering upon the valuation, as their umpire, such option to be declared by my eldest son at the time of my death, by notice in writing delivered to my trustees or trustee, or any one of them, or left at their or one of their usual or last known places or place of abode, within one calendar month next after my decease, and by my other sons respectively within one calendar month next after the time when the period allowed to the person next preceding him in seniority shall

Right of pre-emption to several sons successively.

have expired, or such person shall have declared in writing his intention not to purchase the same real and leasehold estates ; but no purchaser under the trusts of this my will shall be obliged to take notice of or be affected by this power of pre-emption.

Devise of two messuages to trustees to offer one to testator's first and second sons and the other to the same sons, reversing their order, in succession, and if they decline, then to sell.

I DEVISE all that piece of ground situate &c. and all those two messuages &c. thereon, unto and TO THE USE of the said [*trustees*], their heirs and assigns, UPON TRUST, as soon as conveniently may be after my decease, to offer to my eldest son [*name*], and my second son [*name*], successively, the option of becoming the purchaser of the easternmost of the said two messuages, and the ground thereto belonging, with the actual and reputed rights, easements and appurtenances, at the price of £—, and to offer to my said second son and my said eldest son successively the option of becoming the purchaser of the other of the same two messuages, and the ground thereto belonging, with the actual and reputed rights, easements and appurtenances, at the price of £—, and to allow to each of my said two sons the space of two calendar months from the time of making such offer to him, for determining whether he will accept or refuse the same, AND in case my said two sons, or either of them, shall accept such offer of the same messuages, or either of them, within the space aforesaid, then, on payment to the trustees or trustee for the time being of this my will of the purchase-money for the same, to convey and assure the same unto such son or sons respectively, or as he or they shall direct: BUT if the same messuages, or either of them, shall not be purchased by my said sons, or one of them, pursuant to the trusts last aforesaid, THEN upon trust to make sale and absolutely dispose of the said messuages, or such of them as shall not be so purchased, with the ground and appurtenances thereunto belonging, either together or in parcels, and either by public auction or private contract, for the best price or prices that can reasonably be obtained for the same, and to assure the same to the purchaser or purchasers thereof, or in such manner as he or they shall direct. AND I DIRECT and declare that my trustees or trustee shall stand possessed of the moneys to arise from the sale or sales of the said messuages and premises lastly hereinbefore devised, whether purchased by my said sons, or

either of them, or by any other person or persons, upon the several trusts hereinafter expressed and contained concerning the moneys to arise from my residuary personal estate.

AND AS TO all my freehold messuages, lands, tenements and hereditaments particularized in the second schedule hereto; AND ALSO as to all my hereditaments, messuages, lands and tenements particularized in the third schedule hereto, and all other (q) the property, real and personal, not hereinbefore

General devise and bequest of real and leasehold estates to son, subject to debts and legacies and to a prior

(q) In *Egerton v. Massey* (3 C. B., N. S. 338; 3 Jur., N. S. 1325; 6 W. R. 130), a testatrix devised realty to E. for life, with remainder in fee to the child or children of E. who should be living at the decease of E., and the issue of such as should be then dead; and for want of such child or issue, to P. in fee. The residuary estate and effects not thereinbefore disposed of the testatrix gave to the said E. in fee. E. conveyed the realty by lease and release to J. in fee, and afterwards died without having been married. The Court of Common Pleas held that the reversion in fee passed under the residuary devise to E., the tenant for life, and that therefore, by the conveyance to J., the life estate merged, and the contingent remainder to P. was destroyed. The decision in the above case is consistent with the authorities, but it cannot be supported on rational grounds. Beyond all question, a testator who devises Blackacre to A. for life, remainder to A.'s unborn children in fee, if no child, to B., in fee, and the residue of his real estate to A., intends that B. shall take all the testator's disposable interest, not given to A. and his children in Blackacre, never dreaming that any interest in Blackacre can pass to A. under the residuary devise. The plain intention is to vest the fee in B., subject to be divested by the contingent limitation to the children of A., and why full effect should not have been given to this intention, it is difficult to conceive. Let the devise assume this shape—to A. for life, and on his decease, to B. in fee, but if A. shall have a child or children, then, on A.'s decease, to such child or children in fee—the meaning is the same: would not the construction be different? The words “if no child” (or, as in *Egerton v. Massey*, “for want of such issue”) express, according to their true import, not a contingency, but merely the subordinate position of the limitation which they introduce: the obvious interpretation being—“and, subject to the contingency of the last limitation coming into operation, I give B. the vested remainder in fee.” If the limitations were to A. for life, and, on A.'s death, to such person as A. shall nominate and the heirs of such person, and in default of and until such nomination, to B. in fee, it could hardly be contended that B. would not take a vested remainder in fee, subject to the previous contingent limitation, yet such a limitation is virtually a remainder in fee depending on the contingency of A.'s appointment, for whether the object of the limitation is to be called into existence by nomination or birth must

Remarks on *Egerton v. Massey*.

life estate in
part.

specifically disposed of, of which I shall be possessed or have power to dispose at the time of my death (subject to the payment of my just debts and funeral and testamentary expenses, and the pecuniary legacies hereinbefore bequeathed, and including, after my said wife's decease, the freehold hereditaments specified in the first schedule hereto), I GIVE, devise, appoint and bequeath the same unto my said son —, his heirs, executors, administrators and assigns, absolutely: AND I DECLARE that all sales, leases, exchanges, mortgages, charges, contracts and other dealings whatsoever, to be made, created,

Special de-
clarations as
to power of

be quite immaterial. It has been argued that the testamentary limitation which is to take effect by displacing the vested fee must be an executory devise; but as every contingent limitation in fee necessarily takes effect, if at all, by displacing the vested fee, the argument would go to prove the impossibility of such a thing as a contingent remainder in fee. It is said that a remainder limited after a contingent remainder in fee absolute, must be likewise contingent; but what is the estate of A. as residuary devisee if he has not a vested remainder in fee, after a double-aspected contingent remainder in fee, the one aspect necessarily, the other constructively, contingent? The doctrine seems to be pregnant with contradiction and absurdity. It assumes that the vested fee is undisposed of by the particular limitations, and that, but for the residuary devise, it would have descended to the testator's heir. Now, that fee which the heir would then have taken as a reversion must, if taken by the residuary devisee, a stranger, be taken as a remainder, and, if it may be so taken by A., why not preferably, and *à fortiori*, by B.? There is no magic in a residuary devise. The will, as interpreted by the doctrine in question, would read thus: "I devise Blackacre to A. for life, remainder to A.'s unborn children in fee, but if no child, to B. in fee. And I devise Blackacre to A. in fee." If the estate of A., as residuary devisee, instead of being involved in the generality of the residuary devise, were distinctly linked on to the limitation of Blackacre, by what terms would it be naturally introduced? Would it not be obnoxious to the very reasoning, good or bad, which treats the limitation to the children as contingent? If it had been held that the fee (as distinguished from the freehold) was in abeyance, we should have had something intelligible at least; but a remainder vesting in A. notwithstanding a prior double-aspected contingent remainder in fee, is difficult to be reconciled with a rule which declares all remainders after a contingent remainder in fee absolute to be contingent. Many eminent conveyancers (and among them the late Mr. Duval) have acknowledged the difficulty of referring the doctrine to any rational ground—it is so, because it is so—just as the estate of the dower trustee, and of trustees to preserve, is a vested remainder, though nobody can tell how or why. Happily, sect. 9 of 8 & 9 Vict. c. 106, now prevents A. from misappropriating the fee.

entered into, or transacted by my said son, his heirs, executors, administrators or assigns for valuable consideration, of, or upon, or in respect of my residuary real property, or any part or parts thereof, shall, as against my creditors and pecuniary legatees, and for the protection and exoneration of purchasers and other parties to such sales or other dealings, take effect as paramount and precedent to the charges in favour of such creditors and legatees created by my will, and be of the same force as if such charges were omitted from my will, [yet so that, as to the freehold hereditaments specified in the first schedule hereto, such sales or other dealings be, during the life of my wife, made, created or entered into with her concurrence]; and this declaratory clause shall not exclude, prejudice or affect any protection or exoneration to which such purchasers or other parties would be entitled under the rules or doctrines of equity.

devisee to sell and manage devised estates, notwithstanding the existence of charges.

I DEVISE unto and to the use of my said trustees [*names*], their heirs and assigns, all the real estate, and bequeath to them the residue of the personal estate of or to which I shall be seised, possessed or entitled at my decease, upon the trusts, and subject to the declarations following: namely, UPON TRUST to (*r*) sell and convert into money my said trust estates, or such parts thereof as shall be of a saleable or convertible nature, and to get in the other parts thereof; WITH power as to any of the said trust estates under which there are, or are supposed to be, minerals, to sell the surface apart (*s*) from the minerals, or to

Real estate and residue of personal estate;

—sale and conversion.

Power to sell minerals apart from the surface.

(*r*) It will be noticed that the trusts for sale in the precedents contained in this volume are almost invariably given in the infinitive mood: "Upon trust to sell," thereby avoiding the various lengthy forms, such as "upon trust that they the said [*trustees*], or the survivors or survivor of them, or the executors or administrators of such survivor, their or his assigns, do and shall sell, &c." and other similar forms. These, though proper in the case of powers, are unnecessary in the framing of trusts which devolve with the estate (see opinion of Mr. Hayes, cited in Dart's V. & P. 394, n.; *Lane v. Debenham*, 11 Ha. 188; *Hall v. May*, 3 K. & J. 585); and see also *Cooke v. Crawford*, ante, p. 278.

Trusts for sale.
Form of expression.

(*s*) Where, under a power of sale in a will devising an estate in strict settlement, the trustees sold the land, and the tenant for life, whose consent to the exercise of the power was requisite, sold the timber on the estate, and received the price of the timber (he being unimpeachable of waste,

Sale by trustees of estate without the timber.

sell the minerals together with or apart from the surface, and to grant or reserve such rights of way, air and water, of in-

22 & 23 Vict.
c. 35, s. 13.

Sale of mine-
rals apart
from the sur-
face of land.

25 & 26 Vict.
c. 108.

and therefore entitled to have cut it down), it was held that the power was not well executed, and that equity could not relieve the purchaser (*Cockerell v. Cholmeley*, 1 R. & M. 418, 1 C. & F. 60). But see, now, 22 & 23 Vict. c. 35, s. 13. The same doctrine was extended to mines, and it was held that a power of sale and exchange did not authorize trustees to sell the lands with a reservation of the minerals; the principle was, that the power must be so exercised as not to give the tenant for life more out of the property subject to the power than he would have had if the power had not been exercised; and it was a bad execution of the power to sell the surface of the land apart from the timber and minerals, and all that was properly and necessarily connected with the land, in the ordinary meaning of the term (*Buckley v. Howell*, 29 Be. 546). But by the 25 & 26 Vict. c. 108, it is enacted, that (sect. 1) "No sale, exchange, partition or enfranchisement at any time heretofore of land by any trustee or other person, expressed or intended to be made in exercise of any trust or power authorizing the sale, exchange, partition or enfranchisement of land, and not forbidding the reservation of minerals, and which sale, exchange, partition or enfranchisement shall have been made with an exception or reservation of minerals, and with or without rights or powers for or incidental to the working, getting and carrying away of such minerals or otherwise relating thereto, shall be invalid on the ground only that the trust or power did not expressly authorize such exception or reservation, but such sale, exchange, partition or enfranchisement shall be deemed to have taken effect in the same manner as if the exception or reservation had been authorized by the trust or power, and no sale, exchange or partition heretofore made as aforesaid of any minerals separately from the residue of the land subject to the trust or power intended to have been exercised, and either with or without such rights or powers as aforesaid, shall be invalid on the ground only that the trust or power did not expressly authorize such sale, exchange or partition, but such sale, exchange or partition shall be deemed to have taken effect in the same manner as if such minerals, rights and powers (if any) had been expressly authorized to be so dealt with separately from the residue of such land; but this enactment shall not be deemed to confirm or affect any sale, exchange, partition or enfranchisement already declared by a Court of competent jurisdiction to be invalid, nor to confirm or affect any sale, exchange, partition or enfranchisement as to the validity of which any suit or other proceeding is now pending." And, by sect. 2, it is further enacted, that "Every trustee and other person now or hereafter to become authorized to dispose of land by way of sale, exchange, partition or enfranchisement may, unless forbidden by the instrument creating the trust or power, so dispose of such land with an exception or reservation of any minerals, and with or without rights and powers of or incidental to the working, getting or carrying away of such minerals, or may (unless for-

stroke and outstroke, and other easements in, upon, over or under any of the said estates, as may be necessary or desirable for the most effectual and advantageous winning, working, storing, manufacturing, selling and carrying away of any such minerals [or any minerals under adjacent or neighbouring lands], WITH full discretionary power to sell by public auction or private contract, together or in parcels, subject to such terms and conditions as to the title, or the evidence or commencement of title, or the time or mode of payment of the purchase-money, or indemnity against or apportionment of incumbrances, or as to any other matters relating to the sale, as my said trustees shall judge expedient; ALSO to fix reserved biddings, and buy in property offered for sale, and vacate or vary contracts for sale, and to resell as aforesaid without liability to answer for any consequential loss; And generally to effect the sale and conversion of my said trust estates on such terms and in such manner as they shall deem most advantageous: ALSO full discretionary power to —discretion—

bidden as aforesaid) dispose of by way of sale, exchange or partition the minerals with or without such rights or powers separately from the residue of the land, and in either case without prejudice to any future exercise of the authority with respect to the excepted minerals, or (as the case may be) the undisposed-of land; but this enactment shall not enable any such disposition as aforesaid, without the previous sanction of the Court of Chancery, to be obtained on petition in a summary way, of the trustee or other person authorized as aforesaid, which sanction once obtained shall extend to the enabling from time to time of any disposition within this enactment of any part or parts of the land comprised in the order to be made on such petition, without the necessity of any further or other application to the Court."

Sale of minerals apart from surface.

This Act came into operation on the 7th August, 1862; upon applications to the Court by trustees or other persons under the last section, the consent of the persons beneficially entitled is required (*Re Brown's Trusts*, 1 N. R. 13, 11 W. R. 19); but an order will be made authorizing the sale of lands with a reservation of the minerals, and also the sale of the minerals apart from the residue of the land, in general terms, without reference to any particular sale (*Re Willway's Trusts*, 1 N. R. 469); and a schedule containing a description of the lands may be appended to the order (*Re Roper's Estate*, 2 N. R. 442).

To prevent the necessity for an application to the Court, a clause like that in the text, giving the trustees in their discretion the powers in question, may properly be inserted when devising mineral property. (See 4 Dav. Conv. by Waley, 31).

ary power to
postpone
conversion.

—[interim
manage-
ment;

—[leasing
power];

—[construc-
tive con-
version from
testator's
death;

Postpone-
ment of sale.
Trustees' lia-
bility.

Shares, &c.;
period of
conversion.

suspend (*t*), for such period as my said trustees shall judge expedient [*or*, so long as my said wife shall continue my widow, or as any child of mine, being a son, shall be under the age of twenty-one years, or, being a daughter, shall be under that age, not having been married], the sale, conversion or getting in of my said trust estates, or any part or parts thereof respectively [*or*, of such part or parts of my said trust estates as shall yield present income, *or*, of my said real trust estate, or any part or parts thereof, and of such part or parts of my personal trust estate as shall consist of investments in or upon any stocks, funds, shares (*u*) or securities, British or foreign, real or personal, yielding or not yielding present income]: ALSO full discretionary power, during the suspense of the sale, conversion, or getting in of the said trust estates respectively, to manage and order all the affairs thereof, as regards letting, occupation, cultivation, repairs, insurance against fire, receipt of rents, indulgences and allowances to tenants, and all other matters, but so that no lease shall be granted otherwise than from year to year, or for a term not exceeding twenty-one years in possession, at the most improved rent, without fine or premium [*or*, and in the execution of this power of letting, to grant building, repairing, improving, mining or other leases, for such term or terms, at such rent or rents, and generally on such conditions as my said trustees shall deem advantageous, either taking or not taking fines or premiums, which, if taken, shall be considered as sale moneys for the purposes of the trusts hereinafter contained]: ALSO full discretionary power to employ receivers, bailiffs, accountants, agents and others, in or about the affairs of my said trust estates, with such salaries or remunerations as my said trustees shall think reasonable: AND I DECLARE that, for the purposes of enjoyment and transmission under the trusts hereinafter contained, my said trust estates shall be considered as

(*t*) In a trust for sale "so soon as convenient" after the testator's death, the trustees refused an offer of 900*l.*, and the estate remained unsold for twenty-three years: the trustees were held liable for the difference between 900*l.* and the produce of the actual sale (*Fry v. Fry*, 27 Be. 144).

(*u*) As to the period within which executors should convert shares, and the consequence of their neglecting to realise, see *Hughes v. Empson* (22 Be. 181); *Grayburn v. Clarkson* (L. R., 3 Ch. 605).

money from the time of my decease, and the rents, dividends, interest and other yearly produce thereof respectively to accrue due after my decease and until the actual sale, conversion and getting in thereof shall be deemed the annual income thereof, applicable as such, for the purposes of the said trusts, without regard to the amount of such income, or to the nature of the investment or investments yielding the same: AND as to the moneys to arise from the sale, conversion and getting in of my said trust estates, UPON TRUST thereout, in the first place, to pay or retain all the expenses incident to the execution of the preceding trusts and powers, and my debts and funeral and testamentary expenses (x); and, in the next place, to pay the pecuniary legacies hereinbefore bequeathed, and appropriate the funds hereinbefore directed to be appropriated for answering the annuities hereinbefore bequeathed, and in the meantime to pay the same annuities: AND upon further trust to invest the ultimate surplus of the said trust moneys in the names of my said trustees, in or upon permanent public stocks, funds or securities of the United Kingdom, or on the security of a mortgage or mortgages of any freehold or copyhold [or, leasehold] estates in England or Wales (but not elsewhere, and not in or upon any other kind of security), and from time to time, with the consent in writing of my said wife, until she shall die or marry, and afterwards, in the discre-

—rents, &c.
to be deemed
income.

Trusts of
proceeds;

—expenses,
debts, lega-
cies and an-
nuities;

—Investment
of ultimate
surplus;

(x) Testamentary expenses do not include costs of an administration suit, which are primarily payable out of the general personalty, even though the will exonerates the personalty from "the costs and charges of proving the will" (*Stringer v. Harper*, 26 Be. 585). But "testamentary and legal expenses" may include the costs of an administration suit (*Coventry v. Coventry*, 2 Dr. & S. 470). And where a testator devised realty in trust for sale to pay debts, "and the costs and charges of proving and attending the execution of his will and the several trusts therein contained," the costs of an administration suit were held to be charged upon the devised estate (*Alsop v. Bell*, 24 Be. 451). See also *Webb v. De Beauvoisin* (31 Be. 573); *Gilbertson v. Gilbertson* (34 Be. 354).

Testamen-
tary ex-
penses.

Where a suit is occasioned by a difficulty in carrying out the trusts of a will of realty and personalty arising with regard to some particular part of the estate, the costs are payable out of the residuary personalty, even though the difficulty arise with respect to realty alone; but where the suit is for the general administration of the real and personal estate, and it becomes necessary to sell the real estate, the costs will be apportioned between the realty and personalty (*Puxley v. Puxley*, 1 N. R. 509).

—income to wife, during her widowhood;

—charged with maintenance, &c. of children;

—capital to children equally.

Settlement of the shares of daughters;

—investment;

—inalienable life-interest.

tion of my said trustees, to vary the investment or investments of my said trust moneys for any other or others of the description contemplated by this trust, AND UPON FURTHER TRUST to permit and empower my said wife to receive the annual income of my said trust moneys, or the stocks, funds and securities whereon the same shall be invested as aforesaid (which moneys, stocks, funds and securities are hereinafter referred to under the denomination of "the said trust fund") during her life, if she shall so long continue my widow, she thereout maintaining, educating and bringing up such of my sons as shall, for the time being, be under the age of twenty-one years, and such of my daughters as shall, for the time being, be under that age, not having been married, in a manner suitable to their station in life: AND immediately after her decease or future marriage, as to as well the capital as the annual income of the said trust fund, IN TRUST for my child, if only one, or all my children, if more than one, who, either before or after the decease or future marriage of my said wife, shall, being a son or sons, attain the age of twenty-one years, or, being a daughter or daughters, attain that age or be married, and, if more than one, to take in equal shares (y): BUT I declare that if such child or children, or any of them, shall be a daughter or daughters, then [one moiety of] the said trust fund, or [of] the share thereof to which such daughter, or each of such daughters, shall become entitled, shall be held by my said trustees upon the trusts following; namely UPON TRUST, with the consent in writing of my daughter entitled thereto, and after her decease, in the discretion of my said trustees, to convert the same into money, and invest the moneys to arise therefrom in or upon any of such securities as (and not any other than) are hereinbefore authorized, and from time to time, with the like consent or in the like discretion, to vary the investment or investments for any other or others of the same description: AND upon further trust to pay the annual

(y) If this form of trust be adopted, the substitutionary clause (*ante*, p. 292, and *post*, p. 474) will be necessary to entitle the issue of any child of testator dying in his lifetime to participate (see *ante*, pp. 56, 58, 294, 295). The clause, *ante*, p. 354, and *post*, p. 479, is framed so as to include the issue of children dying in testator's lifetime, or before the period of distribution, and will be found useful in the majority of cases.

income of the same moneys, or the securities whereon the same shall be invested as last aforesaid (which moneys and securities are hereinafter referred to under the denomination of "the said settled fund"), as and when the same shall, from time to time, become actually receivable, into the proper hands of my same daughter, for her separate use, free from marital control, without power of anticipation, as a strictly personal and inalienable provision, during her life, unless and until she, being discovert, shall do or suffer any act, matter or thing, whereby, notwithstanding the restriction on anticipation hereinbefore imposed, the same income, or any part thereof, shall, either voluntarily or involuntarily, be aliened or incumbered, for which annual income the receipts of my said daughter shall alone be discharges to my said trustees: BUT if she, being discovert, shall do or suffer any such act, matter or thing as aforesaid, then, immediately after the doing or suffering thereof, as to the annual income of the said settled fund to accrue during the remainder of her life, UPON such trust or trusts, and subject to such restrictions and declarations, in favour or for the benefit of my same daughter, as my said trustees shall, by any deed or deeds, to be made with or without power of revocation and new appointment, appoint: AND in default of such appointment, and subject to any partial appointment, to pay or apply the same in such manner as the same would, by virtue of the trusts hereinafter contained, be payable or applicable if my same daughter were actually dead: [or, UPON TRUST (z) to pay the annual income of &c., as and when the same shall, from time to time, become actually receivable, into the proper hands of my same daughter, during her life, for her separate use, free from the control of any husband to whom she may be married, without power of alienation or anticipation, as a strictly personal provision, for which annual income her receipts shall alone be sufficient discharges to my said trustees.] And immediately after the decease of my same daughter, as to as well the capital of the said settled fund as the annual income thenceforth to accrue due for the same, IN TRUST for all or any one or more exclusively of the children and remoter issue of my same daughter (such remoter issue being born in her lifetime), in such proportions, for such interests, and generally in such

[Another form];

—children and other issue of daughter, as she shall appoint;

(z) This trust will not prevent an assignment during discoverture.

manner as she, whether covert or sole, shall from time to time by deed, with or without power of revocation and new appointment, or by her will, appoint; BUT no child, in whose favour or in favour of whose issue an appointment shall be made, shall participate under the trust next hereinafter contained in the unappointed portion of the said settled fund, without bringing the benefit of such appointment into hotchpot (a): AND in default of appointment, and subject to any partial appointment, IN TRUST for the child, if only one, or all the children, if more than one, of my same daughter, who, either before or after her decease, shall, being a son or sons, attain the age of twenty-one years, or, being a daughter or daughters, attain that age or be married, such children, if more than one, to take in equal shares; BUT if there shall not be any child of my same daughter, who, being a son, shall attain the age of twenty-one years, or, being a daughter, shall attain that age or be married, then IN TRUST for such persons, for such interests, and generally in such manner in all respects, as my same daughter, whether covert or sole, shall by will appoint; AND in default of appointment, and subject to any partial appointment, IN TRUST for the person or persons who, at the decease of my same daughter, shall be of her blood and of kin to her, and who, under the statutes for the distribution of intestates' effects, would be entitled to her personal estate if she were dead, a spinster, domiciled in England, and intestate, such persons, if more than one, to take in the proportions prescribed by the same statutes. AND I EMPOWER my same daughter (notwithstanding the trusts herein contained, subsequently to the trust in her own favour), by deed, executed either after or in contemplation of her marriage, or by will, to appoint the annual income, to accrue due after her decease, of the said settled fund, or any part of such income, to and for the life of any husband of my same daughter who shall survive her. I EMPOWER my said trustees, during the minority of each child of mine, to apply such part as they shall think fit of the annual income of the fund or share to which such child shall be entitled or contingently entitled in possession, in or towards the

—hotchpot;

—in default, for children equally;

—if no child,

—as daughter shall by will appoint;

—daughter's next of kin.

Daughter empowered to appoint a life-interest to a husband.

Maintenance of testator's children;

Hotchpot.

(a) As to Hotchpot, see Co. Litt. 177 a; 22 & 23 Car. 2, c. 10, s. 5; 2 Bl. Comm., 16th Ed. p. 190; *Rucker v. Scholefield*, 1 H. & M. 36; *Maclaren v. Stainton*, 7 Jur., N. S. 691; 3 Dav. Conv. pp. 124—126, 555; 4 Dav. Conv. by Waley, 176, 177, 195.

maintenance and education, or otherwise for the benefit, of the same child; and I direct them to accumulate, by investments pursuant to the trust for investment hereinbefore contained, the unapplied surplus, if any, of such income, and declare that the accumulations thereof shall be liable to be in like manner applied, but, subject to such liability, shall be added, as capital, to the fund or share whence the same shall have arisen. I —advancement of testator's children, irrespective of minority;

ALSO EMPOWER my said trustees, with the consent in writing of my said wife during her widowhood, and after her decease or marriage, in their discretion, and notwithstanding any of the trusts hereinbefore declared of the said trust fund, to apply any part or parts, not exceeding in the whole one moiety [*or*, one third part, *or*, not exceeding in the whole the amount or value of £—— sterling], of the capital of the fund or share to which each or any child of mine shall be entitled or contingently entitled, in or towards the advancement in life or otherwise for the benefit of the same child, whether such child shall be a son or daughter, or shall be under the age of twenty-one years or not. I ALSO EMPOWER my said trustees to apply all —maintenance of daughter's issue; or any part of the annual income of the share or shares to which each or any infant child or issue (*b*) of each or any daughter of mine shall be entitled or contingently entitled in possession, by virtue of any appointment or appointments, or otherwise under the trusts aforesaid (unless such appointment or appointments shall otherwise direct), in or towards the maintenance and education or otherwise for the benefit of such child or issue [*or* at the option of my said trustees to pay the same to the parent or guardian of the infant, to be so applied, but for the application whereof by such parent or guardian my said trustees shall not be responsible]; and I direct my said trustees to accumulate, by such investments as aforesaid, the unapplied surplus, if any, of such income, and declare that the accumulations thereof shall be liable to be in like man-

(*b*) These powers of maintenance and advancement are sometimes omitted on the supposition that they will be inserted in the instrument of appointment. The insertion of the powers in the will provides not only for the case, which is of frequent occurrence, of the instrument of appointment containing no such powers, but also for the case of there being no appointment.

—advancement of daughter's issue irrespective of minority.

Substitution of grandchildren for children of testator predeceasing him.

On failure of previous trusts;

—as testator's wife shall by will appoint;
—for testator's next of kin.

ner applied, but, subject to such liability, shall be added, as capital, to the share or respective shares whence the same shall have arisen. I ALSO EMPOWER my said trustees, with the consent in writing of my said wife during her widowhood, and after her decease or marriage, in their discretion, to apply any part or parts, not exceeding one moiety of the capital of the share to which each or any child or issue, whether under the age of twenty-one years or not, of each or any daughter of mine shall be entitled or contingently entitled by virtue of any appointment or appointments or otherwise under the trusts aforesaid (unless otherwise directed as aforesaid), in or towards the advancement in life or otherwise for the benefit of such child or issue; but no such application as last aforesaid shall be made during the life of my same daughter without her previous consent in writing, nor, after her decease, to the prejudice of the life interest of any husband, in whose favour an appointment shall have been made by her under the power for that purpose hereinbefore contained, without his like consent. I DECLARE that if any son or daughter of mine shall die in my lifetime, and any child or children of such son or daughter shall be living at my decease, then the said trust fund, or the share thereof to which the son or each son so dying would, if living at my decease, and if then of the age of twenty-one years, or to which the daughter or each daughter so dying would, if living at my decease, have been entitled under the trusts aforesaid, shall be held by my said trustees upon such trusts, and subject to such provisions in favour of the child or children of such son or daughter respectively, as the same would have been held, if, as regards a son so dying, such son were a daughter, and had died immediately after my decease, or, as regards a daughter so dying, such daughter had died immediately after my decease; BUT in case no child or other issue of mine shall acquire an absolutely vested interest in the said trust fund by virtue of my will, then, as to the same trust fund, IN TRUST for such persons, for such interests, and generally in such manner as my said wife, she continuing my widow at her decease, shall by her will appoint; AND in default of such appointment, and subject to any partial appointment, IN TRUST for the person or persons who, at the decease or future marriage of my said wife, shall be of my blood and of kin to

me, and who, under the statutes for the distribution of the personal effects of intestates, would be entitled to my personal estate, if I were to die immediately after the decease or marriage of my said widow intestate and domiciled in England, such persons, if more than one, to take in the proportions prescribed by the same statutes.

I DEVISE and bequeath all hereditaments whatsoever of or to which I shall be seised or entitled at my decease not otherwise herein disposed of, And also all leasehold tenements, sums of money (c), and other personal estate to which I shall be entitled at my decease not herein otherwise disposed of, unto and to the use of my said trustees [*names*], their heirs, executors, administrators and assigns; As to any hereditaments vested in me upon any trusts, or by way of mortgage, or subject to any contract for the sale thereof, UPON TRUST to dispose thereof, pursuant to the equities affecting the same respectively, And as to all other the real and personal estate lastly hereinbefore devised and bequeathed, which are together hereinafter referred to as "the said residuary trust premises," UPON TRUST, by and out of the rents, interest and other annual proceeds thereof, or by exercising the powers to sell and mortgage hereinafter contained, or either of them, as my trustees

Residuary
devise and
bequest.

As to trust
and mortgage
estates sub-
ject to the
equities.

As to all
other the real
and personal
estate,

—upon trust;

(c) In the absence of any other bequest of residuary personalty, a bequest of "money that may remain after the payment of my debts," includes the general residue of personalty; and such a bequest of "money" has been held to pass the testator's reversionary interest in a sum charged on real estate (*Stocks v. Barré*, Joh. 54). And see *Montagu v. Sandwich* (33 Be. 324).

Bequest of
"money."

A bequest of "ready money" includes not only cash in the house, but cash at a banker's upon an ordinary account current (*Parker v. Marchant*, 1 Ph. 356), or in a savings-bank, such money being payable on demand, or the required notice to pay having been given and the time expired before the testator's death (*Re Powell's Trust*, Joh. 49). But a bequest of "ready money" does not include promissory notes or notes of hand (Ib.).

"Ready
money."

But for the construction of bequests of this kind, where the question is as to what is included in some general popular term or description, it seems impossible to lay down any rule; the intention of the testator must be gathered from the whole instrument. Accordingly, in *Langdale v. Whitfield* (4 K. & J. 426), the word "moneys" in a codicil was held to comprise not only money in hand but moneys due upon securities or otherwise; and this, notwithstanding express mention was made in the will of "moneys and securities for money."

—to pay
debts, &c.;

—to repair
and complete
buildings;

—to insure
from fire;

—to pay
succession
and legacy
duties;
—to pay
costs;

—to pay wife
annuity of
£300;

—reducible
to £100 on
marriage;

—to be paid
quarterly;

—with pro-
portionate
part;

—subject as
aforesaid:

—upon trust
for children
of testator;

shall in their absolute discretion think proper, to pay my funeral and testamentary expenses, and my debts (other than the mortgage and other debts hereinbefore expressly provided for), and also to pay the legacies hereinbefore given, and any other legacies I shall hereafter bequeath, free from legacy duty and without deduction, and also to pay such sums of money as my trustees shall think proper to expend in altering or improving any of the said trust premises, or in completing any messuage or other building on the said trust premises that shall be in course of erection at the time of my decease, or in insuring any buildings against loss or damage by fire, if my trustees shall think proper to insure the same; and also to pay all succession and legacy duties that shall be payable by reason or in consequence of any devise or bequest herein contained, and also to pay all costs, charges and expenses that my trustees shall incur in carrying into effect any of the trusts or purposes of this my will, so far as the same relate to or comprise the said residuary trust premises: AND subject and without prejudice to the trusts aforesaid, UPON TRUST to pay unto my said wife an annuity of £300 during her life, but in case my said wife shall marry again, then the said annuity of £300 shall be reduced to an annuity of £100, and shall be for her sole and separate use, free from marital control, and without power to anticipate the growing payments thereof. AND I direct that the said annuity of £300 or £100, as the case may require, shall be paid, without deduction, by equal quarterly payments in every year, together with a proportionate part for a period of less than three calendar months down to and including the day of cesser of the said annuity or substituted annuity, the first payment of the said annuity of £300 to be made on the expiration of three calendar months next after my decease, and the first payment of the said annuity of £100 to be made on the expiration of three calendar months next after the marriage of my said wife as aforesaid, if she shall be living at the respective periods aforesaid: AND as to the said residuary trust premises, subject and without prejudice to the trusts aforesaid, UPON TRUST for my child, if only one, or all my children, if more than one, who, either before or after my decease, being a son or sons, shall attain the age of twenty-one years, or, being a daughter or daughters, shall attain that age, or be previously married with

the consent of her or their guardians for the time being, and if more than one as tenants in common, but not in equal shares, it being my intention that the share of each of my sons who shall attain a vested interest under the trust last aforesaid shall be to the share of each of my daughters who shall attain a vested interest under the same trust in the proportion of three to two. And in case I shall have only one child who shall attain a vested interest under the trust last aforesaid, then the said residuary trust premises shall be wholly held in trust for such one child absolutely. I EMPOWER my trustees, if they in their absolute discretion shall think proper, to postpone the ultimate division of the said residuary trust premises until the — day of —, 18—, [*or*, for any term not exceeding twenty-one years from my decease], with power for them to advance and pay to each of my sons, after he shall have attained a vested interest in the said residuary trust premises under the trust last aforesaid, from time to time, or at any time, any sum or sums of money not exceeding together the sum of £—, in part satisfaction of his ultimate share; and also to pay to each of my daughters, after she shall have attained a vested interest under the trust last aforesaid, from time to time, or at any time, any sum or sums of money not exceeding together the sum of £—, in part satisfaction of her ultimate share. I empower my trustees to apply the whole or any part of the annual income of the share to which for the time being each or any infant legatee would, if of the age of twenty-one years, be absolutely entitled in possession, of and in the said residuary trust premises, for or towards the maintenance or education, or otherwise for the benefit of such legatee during minority, or at the option of my trustees to pay the same to the parent or guardian of such legatee, to be so applied, and neither my trustees nor such parent or guardian shall be under any liability to account for the same; and the unapplied income (if any) shall be accumulated either in the hands of a banker or otherwise as my trustees shall think proper, and the accumulations shall be liable to be applied in manner aforesaid, and subject to such liability shall be deemed accretions to the capital or share whence the same income arose. I empower my trustees, and, if deemed expedient, by exercising the powers to sell and mortgage hereinafter contained, or either of them, to raise, ad-

—in unequal shares.

Discretion to postpone division.

Advancement of a gross sum.

Maintenance.

Accumulation.

Advancement.

vance and apply any sum or sums of money not exceeding together the fair and reasonable value of one moiety of the expectant share for the time being of any child of and in the said residuary trust premises, either in possession or reversion, for the placing him or her in any profession, business, or employment, or for his or her instruction therein, or on his or her marriage, or to pay any debts or sums of money claimed to be due from him or her, or otherwise for his or her benefit or advancement in the world, and that whether such child shall then have attained a vested interest in his or her share or not, but so that if the child be entitled in reversion such advance shall not be made without the consent in writing of the previous taker, who, though a female, shall be competent notwithstanding coverture, to consent.

Heir-loom; AND I DIRECT that all my plate, pictures, books, linen and furniture, which, at the time of my decease, shall be in or about my said house at —, shall be deemed heir-loom, and go along with my said house at — to the person or persons who under the limitations hereinbefore contained shall for the time being be entitled to the same; and for that purpose I exempt the said plate, pictures, books, linen and furniture from the payment of my debts and legacies; BUT I DECLARE that such heir-loom shall be subject to an executory limitation over, on the death of any tenant in tail by purchase of the said house under the age of twenty-one years without leaving issue in tail living at his or her death, to or in favour of the person or persons entitled under the subsequent limitations, according to the tenour of such limitations.

—exonerated
from testa-
tor's debts;

—but subject
to executory
limitation
over.

Personal
chattels in
strict settle-
ment as heir-
loom, where
there is no
real estate.

I GIVE all the plate, library of books, book-cases, manuscripts, framed and unframed pictures, paintings, drawings, prints, engravings, bronzes, medals, sculptures and statuary of which I shall die possessed to [*trustees*], their executors, administrators and assigns, UPON TRUST, during the life of my said wife, to permit the same to be enjoyed by her, AND from and after her death, UPON SUCH TRUSTS as shall, as nearly as the rules of law and equity will permit, correspond with limitations of freehold estate, to the effect following (that is to say), TO THE USE of my eldest son during his life, with remainder to the use of

his first and other sons successively, according to priority of birth, in tail male, WITH remainder to like uses in favour of my second and every other son successively, according to priority of birth, and their respective first and other sons successively, for life and in tail male respectively ; WITH remainder to the first and other sons of my first son successively, according to priority of birth, in tail, WITH remainder to the use of the first and other sons successively, according to priority of birth, of my second and other sons successively as aforesaid, in tail, with remainder TO THE USE of the daughter or daughters of my first son, in tail, and if more than one as tenants in common, with cross-remainders in tail between them, WITH remainder to like uses in tail, in favour of the daughter or daughters of my second and other sons successively as aforesaid, With remainder TO THE USE of my first and other sons successively, according to priority of birth, in tail, With remainder TO THE USE of my daughter or daughters in tail, and if more than one as tenants in common, with cross-remainders in tail between them, With remainder TO THE USE of my own right heirs: BUT I DECLARE that the chattels lastly hereinbefore bequeathed shall be subject to an executory limitation over, on the death, under the age of twenty-one years without leaving issue in tail living at his or her death, of any person who, under the limitations aforesaid of real estate, would be tenant in tail thereof by purchase, to or in favour of the person or persons who would as aforesaid be entitled under the subsequent limitations, according to the tenour of the same limitations.

Executory limitation over on death under 21 and without issue in tail, of any tenant in tail by purchase.

AND (subject as aforesaid) as to the capital and income of the said trust fund, UPON TRUST for such of my children living at my decease, and such of the issue then living of any child or children of mine dying in my lifetime, as either before or after my decease shall, being males, attain the age of twenty-one years, or, being females, attain that age or be married, as tenants in common, in a course of distribution according to the stocks, the issue of deceased children of mine taking by substitution, as tenants in common, the shares only which their respective parents would, if living at my decease, have taken.

Trust for children and for the issue *per stirpes* of such children by substitution.

Trust of residuary personal estate, or accumulated specific fund.

UPON TRUST for the absolute use and benefit of the first person, being of the age of twenty-one years, who shall, by virtue of my will, become entitled, whether as tenant for life, or as tenant in tail [male] by purchase, to the actual possession, or to the receipt of the rents and profits of my settled estate [*or*, the hereditaments hereinbefore devised in strict settlement].

Name and arms clause.

PROVIDED ALWAYS and I hereby direct and declare that the said James C. shall, within six calendar months next after my decease and his having actually entered into and taken possession of the said freehold manors, hereditaments and premises, and the said leasehold premises hereinbefore described to be situate in the county of D., or either of them, or any part thereof respectively, take upon himself the surname of S. only, and shall thenceforth style and write himself in all letters, deeds and instruments, and upon all occasions whatsoever, by that surname alone; And shall also use and bear the arms of S., quartered as the same are now quartered, used and borne by —. AND if the said James C. shall refuse or fail to assume, quarter, use and bear such surname and arms within the period hereinbefore limited for that purpose, or if the said James C., after having assumed, quartered, used or borne the said surname and arms, shall afterwards discontinue to bear, use and quarter the said surname and arms, any or either of them, for the space of six calendar months, THEN and in any such case the estate and interest hereby devised and bequeathed to the said James C., his heirs, executors, administrators and assigns respectively, in the said freehold and leasehold premises, shall cease; AND the said freehold and leasehold premises shall thereupon go to and become vested in the said John C., his heirs, executors, administrators and assigns respectively, but upon and subject to a condition or proviso, similar, so far as circumstances will permit, to that which is hereby attached to the last-mentioned devise and bequest in favour of the said James C., his heirs, executors, administrators and assigns respectively. AND if the said John C. shall also refuse or fail to assume, quarter, use and bear such surname and arms within the period by the last-mentioned condition or proviso limited

for that purpose; or if the said John C., after having assumed, Name and arms clause. quartered, used or borne the said surname and arms, shall afterwards discontinue to bear, use and quarter the said surname and arms, any or either of them, for the space of six calendar months, then and in any such case I DIRECT and declare that the same freehold and leasehold premises shall go to and become vested in my nephew, William C., his heirs, executors, administrators and assigns respectively, for his and their own absolute use and benefit.

PROVIDED ALWAYS that if the second or any other [younger] Shifting clause. son of the said —, or any issue male of such second or other [younger] son, shall become entitled to the family estate of —, and any younger son of the said —, or any issue male of his body, entitled or inheritable under the aforesaid limitations or proviso, shall be then living, then and in such case and so often as the same shall happen, the uses originally, or by virtue of the last proviso, limited to the son who or whose issue shall so become entitled as aforesaid, shall cease (*d*): BUT my will is, that if, by virtue of such proviso, the said hereditaments shall have shifted from any younger son of the said —, or from his issue male, and there shall afterwards be a failure of issue male of all the sons of the said —, younger than the son from whom or from whose issue male the same shall have so shifted as aforesaid, THEN and in that case the same hereditaments and premises shall return, be and remain TO THE USES and be held in the manner to and in which the same would have gone and been held if the proviso for shifting the same had not been inserted in this my will.

(*d*) See, as to shifting clauses, *Micklethwait v. Micklethwait* (4 C. B., N. S. 790); *Biddulph v. Lees* (E. B. & E. 289); *Turton v. Lambarde* (1 D. F. & J. 495); *Walmsley v. Gerard* (29 Be. 321). The operation of such a clause in a will is simply to accelerate the next remainder, and the person from whom the estate shifts is not deemed to be dead without issue, but he and his issue may take the estate under a subsequent limitation (*Gardiner v. Jellicoe*, 12 C. B., N. S. 568; on appeal, 13 W. R. 528). See also *D'Eyncourt v. Gregory* (34 Be. 36); *Kenlis v. Bective* (*ib.* 587); *Bagot v. Legge* (4 N. R. 492).

Power to
lease,

I EMPOWER my said wife, as to the property hereinbefore devised to her during her life, and my said wife, her heirs, executors, administrators and assigns, as to the property [*real and leasehold*] for the time being vested in her or them under the devise hereinbefore contained, in case of my son's death in my lifetime, and during the minority of any of my son's children, to demise all or any part of such property respectively, for such terms, at such rents, and either with or without taking fines or premiums, and generally in such manner as my wife, her heirs, executors, administrators or assigns, shall think proper, and to accept surrenders of existing or future leases of all or any part of such property, upon such terms as she or they may deem advisable; but any fine payable on any such demise shall be treated as capital and not as income, and invested accordingly.

with or with-
out fines and
premiums.

Fines to
be treated as
capital.

Power to
trustees to
lease real
estate subject
to wife's
right to
occupy part.

I EMPOWER my trustees (*e*), until the sale of my real estate (but without prejudice to the directions hereinbefore contained as to the occupation by my said wife of part of my estates at —), to let the same, or any part or parts thereof, from year to year, or for any term or terms of years in possession, at the best rent or rents, without taking any fine or premium, subject to such covenants and conditions as they shall think reasonable:

Annual in-
come of real
and personal
estate till
sale, and of
trade, to be
applied in
the same way
as income of
trust fund.

AND I DIRECT that the rents, interest, dividends and yearly produce of my real estate and residuary personal estate, for the time being unsold or unconverted (including the profits of my said business, if carried on as aforesaid), shall be deemed annual income for the purposes of the trusts hereinbefore contained, and be payable and applicable in the same or the like manner as the yearly produce of the trust fund aforesaid would, if such fund were realized and invested, be applicable.

Power to
lease for
building
and other
purposes.

I EMPOWER my trustees (*e*), from time to time, and at any time during the continuance of any of the trusts aforesaid, to contract with any person or persons for a lease or leases of any part or parts of the said trust premises [*first, secondly and thirdly*] hereinbefore devised and bequeathed, and also to make and execute any lease or leases thereof, either for the erection

of any building or buildings, or for any other purposes whatsoever, for such term or terms of years, under such rents, and with such covenants, clauses, provisions, stipulations and agreements as my trustees shall think reasonable and proper; but so, nevertheless, that no lease for building purposes of the site of any messuage or other building with suitable yards, gardens and other conveniences, be made for any longer term than [*ninety-nine*] years; and that no such lease for any other purpose be made for any longer term than [*twenty-one*] years, such terms of years respectively to commence and take effect in possession on the granting of the lease, or within twelve calendar months next thereafter, and not otherwise in reversion or by way of future interest, and so that upon every such lease there be reserved the best yearly rent or rents that can be reasonably gotten for the same, having regard to the covenants therein contained on the part of the lessee; but I expressly declare that the rent or rents to be reserved in any such lease may during the first two years of the term thereby granted be of a nominal amount, and may be made to increase progressively if my trustees shall think proper, and so that no fine, premium or foregift be taken for the granting of any such lease, or for any contract for the same, and so that in every such lease there be contained a condition for re-entry on non-payment of the rent or rents to be thereby reserved, for the space of twenty-one days next after the same shall become payable, and that the lessee or lessees do execute a counterpart thereof; Provided always and I declare that it shall be lawful for my trustees to rescind or abandon or to vary the terms of any contract which shall be entered into by them for the granting of any such lease as aforesaid, and also to accept the surrender of any lease granted in my lifetime, or after my decease, of the said last-named trust premises respectively, on such terms as my trustees shall think proper, and thereupon to hold and dispose of the premises surrendered as part of the said trust premises respectively: Provided also and I declare that it shall be lawful for my trustees, if they in their absolute discretion shall think proper, to appropriate and dedicate any part of the said last-named trust premises respectively, as and for a garden, pleasure ground, road, street, way, sewer, drain or other such place or easement for the use of the public, or for

Power to lease for building and other purposes.

—to rescind contracts;

—to accept surrenders.

Power to lay out streets, pleasure grounds, &c.

the use of the occupiers of any messuages or other buildings in particular, without receiving any consideration therefor; and generally I empower my trustees to make such arrangements and dispositions of such part of the said trust premises respectively as shall be deemed expedient for the purpose of promoting any building operations.

Power to
lend money
to builders.

AND I EMPOWER my trustees (*f*) to advance any sum or sums of money out of my residuary personal estate to any person or persons who shall contract to purchase or take on lease any part of the said trust premises [*first, &c.*] hereinbefore devised and bequeathed [*or, the said residuary trust premises*] for building purposes, such advances respectively to be secured by way of mortgage or otherwise, as my trustees shall deem sufficient.

Power to
mortgage
or sell, for
purpose of
enfranchis-
ing or pur-
chasing fee
of leaseholds.

I EMPOWER my trustees (*f*), by and out of the rents and profits of the said trust premises respectively, or by mortgaging or selling, or by first mortgaging and afterwards selling (*g*) the same premises respectively, under the powers for such purposes hereinafter contained, or either of them, to enfranchise or purchase the fee-simple of any copyhold or leasehold tenements forming part of the said trust premises respectively, and to cause the same to be settled and assured upon the trusts hereinbefore declared of and concerning the said trust premises respectively.

Building
land.
Power to lay
out land for
squares, &c.

I EMPOWER my trustees or trustee for the time being, upon any such sale or sales, lease or leases, as are authorized by this my will, or in contemplation thereof, to lay out any part or parts of my said trust estates, as or for squares or crescents, with ornamental gardens, and for streets or roads, and to form and make any such squares, crescents, streets or roads, and also main sewers, for the accommodation of houses or other buildings

(*f*) See *ante*, p. 437, n.

Power to sell
or mortgage.

(*g*) It is a doubtful point whether, after a mortgage has been made under a power or trust in the ordinary form, a sale can be made of the mortgaged property by the donees or trustees for the purpose of paying off the mortgage (Sugd. Pow. 426; see also 5 Jarm. Conv. 138): hence the additional powers in the text.

to be erected on land sold or let or proposed to be sold or let in building plots, and also on any such sale or sales, lease or leases, as aforesaid, for building purposes, to except and reserve, or to include as shall be thought expedient, the ownership of the soil in any such squares, crescents, ornamental gardens, roads or streets, and, in case of the exception or reservation of such ownership, to give easements only over such soil, as shall from time to time be thought expedient; and generally to deal with my said trust estates as my trustees or trustee for the time being might do if absolutely and beneficially entitled thereto; and on any such sale or sales, lease or leases, to enter into such covenants, and to require such covenants to be entered into of a mutual character, restrictive or otherwise, for the better enjoyment of the lands sold and retained, or of lands sold to different persons only, as my trustees or trustee for the time being shall think proper, and for the purposes aforesaid, to pull down any buildings standing on my said estates, and to sell or use the materials thereof, the moneys arising therefrom when received to be held upon and for the trusts and purposes herein expressed and declared of and concerning the moneys to arise from the sale of my said trust estates: And for all or any of the purposes aforesaid, to enter into, make, execute and concur in all such contracts, conveyances and assurances as my trustees or trustee for the time being shall think proper, and to alter, vary or modify, on terms or gratuitously, all such contracts, conveyances and assurances. AND I EMPOWER my trustees or trustee for the time being, for the purposes of the said works hereby authorized as aforesaid, to levy and raise by mortgage (with or without a power of sale), or by sale (*h*), or by mortgaging and afterwards selling any part of my said trust estates, any sum or sums of money, not exceeding in the whole the sum of £——, and no mortgagee shall be bound to inquire into the expediency of raising the amount of money required to be advanced by him, or to see to the application thereof.

Building
land.
Power to lay
out squares,
roads, &c.

Power to
mortgage.

(*h*) The Court, under the Settled Estates Act, will not allow the sale of part of the settled estate for the purpose of raising money to make roads (*Re Chambers's Settled Estates*, 28 Be. 653; *Re Hurle's Settled Estates*, 2 H. & M. 196). Settled
estate.
Roads.

Power to
lease unsold
estates.

I DECLARE that it shall be lawful for my trustees or trustee for the time being to demise or lease my said messuages, lands, tenements and real estate hereinbefore devised, or any part or parts thereof, from year to year or for any term or number of years not exceeding [*seven*] years in possession from the making of the lease, so as in every such demise or lease there shall be reserved the best and most improved yearly rent or rents, without taking any fine, premium or foregift, and so as every such lease, for any term or number of years, shall be made by deed, and shall contain a condition of re-entry on non-payment of rent for twenty-one days next after the same shall become due, and so as the lessee or lessees shall execute a counterpart or counterparts, and shall not be made dispunishable for waste (*i*).

Leases,
power to
renew.

I DECLARE my will to be, that the said — and —, and the survivor of them, and the executors or administrators of such survivor, do and shall from time to time, as occasion shall require, in the ordinary course of renewal, use their and his best endeavours to obtain, on the accustomed reasonable terms, a renewed lease or leases, grant or grants of such of the said leasehold or copyhold premises as shall be held for a lease or leases, grant or grants for lives or years, ordinarily renewable, and do and shall from time to time, make, do and execute all such surrenders, acts, deeds, matters and things as shall be requisite or expedient for obtaining such renewals: AND I FURTHER DECLARE, that the fines, fees and expenses of such renewals shall from time to time be defrayed by and out of the premises of which such renewals are to be obtained respectively, so and in such manner that the several persons beneficially entitled to the same, under or by virtue of this my will, shall contribute to the expense of such renewals in the proportions in which, according to the rules of courts of equity, they would be bound to contribute in the absence of any provision in this my will as to the persons at whose expense such renewals are

Mines, waste. (*i*) As to the repugnancy of these words where the trustees have a power to demise the hereditaments and the minerals, see *Daly v. Beckett* (24 Be. 114).

to be made: AND I FURTHER DECLARE, that it shall be lawful for the said — and —, or the survivor of them, or the executors or administrators of such survivor, to raise any money which shall be required for the renewal of any such lease or grant as aforesaid, by mortgage of the hereditaments to be taken by renewal as aforesaid, or of any other hereditaments for the time being subject to the same uses or trusts, and to make all such appointments, assignments, surrenders and other assurances, and do all such other acts as shall be necessary or expedient for the purpose of effectuating any such mortgage or mortgages: and no mortgagee advancing money upon any mortgage purporting to be made under this power, shall be bound to see that such money is wanted, or that no more than is wanted is raised, or to the application thereof.

Renewal of leases.

I EMPOWER my trustees (*j*), during the continuance of any of the trusts hereby declared, to sell or mortgage, or to mortgage and afterwards sell, all or any part of the said trust premises respectively, but without prejudice to any subsisting leases thereof, [and either by public sale or private contract, and either at one time or at several times, and subject to such conditions or stipulations as to the title of the premises, payment of the purchase-money, or otherwise, and in such manner in all respects as my trustees shall think expedient, with power to vary, rescind or abandon any contract, and also to buy in the premises offered for sale at any auction, or any part thereof, and afterwards to mortgage or sell the same as aforesaid, without being answerable for any loss which may arise thereby (*k*),] and also to perform all acts and execute and enter into all deeds, contracts and assurances necessary or expedient for compelling the specific performance of any contract or for effectuating and completing any such sale or mortgage, and in particular that it shall be lawful for my trustees to authorize and insert in any mortgage such power of sale and other powers and clauses as they shall think reasonable.

Power to mortgage and sell.

(*j*) See *ante*, p. 437, n.

(*k*) See *ante*, p. 390, as to the insertion of the part enclosed within square brackets.

Power to
raise money
on mortgage
by trustees
with consent,
&c. ;

—for drain-
age or im-
provements.

I DECLARE that notwithstanding any of the uses and trusts hereby declared or to be limited or declared in exercise of any of the powers hereinbefore contained, and in priority thereto (except the power of leasing hereinbefore contained, and any lease or leases to be created by virtue of the same power), it shall be lawful for my trustees or trustee for the time being, from time to time or at any time, at the request in writing of any person for the time being entitled to the possession or receipt of the rents and profits of my said real estate as tenant for life, to raise by mortgage (either with or without power of sale, and either in fee or for years, at such rate of interest as the said trustees or trustee shall deem reasonable) any sum or sums which may or may appear to the satisfaction of my trustees or trustee for the time being to have been expended by such tenant for life in draining, irrigating or otherwise improving my said real estate, or any part thereof, so, nevertheless, that the sum or sums to be so raised shall not exceed £—— for every acre so drained, irrigated, or improved. Provided also that no mortgagee advancing money under this power shall be bound to see to the application thereof, or that no more than is authorized has been or is being raised.

Proviso as to
mortgages
and costs of
transfer.

I DECLARE that it shall be lawful for my trustees or trustee for the time being, in the execution of the power of [*or, trust for*] sale hereinbefore contained, to sell my said real estates, either subject to or discharged from the mortgages affecting the same respectively; and in case the said estates or any part thereof shall be sold discharged from the said mortgages respectively, then to apply a competent part or parts of the money to arise from the sale or sales of the same estates in or towards payment and satisfaction of the said mortgages respectively. And that my trustees or trustee shall have full discretionary power and authority to take such measures and make such arrangements in relation to the said mortgages respectively, either by paying off the same and taking transfers or assignments thereof, or by obtaining advances from other persons upon transfers thereof, or by way of indemnity or otherwise, as shall be deemed necessary or convenient, and to pay and discharge all the costs, charges and expenses incident to such

measures or arrangements out of the capital moneys which shall come to their or his hands by virtue of this my will.

I DECLARE that from and after the decease of the survivor of them my said wife and my said brother M. P., and the failure of the limitations hereinbefore contained in favour of my child or children and the issue of such child or children, and subject and without prejudice to the annuity or yearly rent-charge of £500, hereinbefore limited to my nephew W. P. for his life, my said hereditaments shall stand charged with the payment to each of my said nephews [*names*] who for the time being shall not be beneficially entitled to the possession or the receipt of the rents, issues and profits of my said hereditaments, or any part or share thereof, under or by virtue of the limitations hereinbefore contained, of an annuity or yearly rent-charge of £200 sterling, to be issuing out of my said hereditaments, and to be payable until the death of such nephew, or until he shall be so entitled as aforesaid, whichever event shall first happen, and to be paid in even portions half-yearly, clear of all deductions except the property tax, if then payable, and the first payment thereof to be made at the end of six calendar months next after the decease of the survivor of them my said wife and the said M. P., and the failure of the limitations hereinbefore contained in favour of my child or children, and the issue of such child or children, with a proportionate part of the same annuity down to the day of the determination thereof. And I further declare that each of such annuitants shall have the same or the like remedies for recovering his annuity as are hereinbefore given to my said nephew W. P., for recovering the annuity of £500 hereinbefore limited to him.

Deferred annuities to nephews, subject to prior limitations and annuity.

Period of annuities.

First payment.

With remedies by reference.

I EMPOWER my trustees, notwithstanding the trust for sale hereinbefore contained, to postpone for such period as they may deem advisable the sale of all or any of the policies of assurance on lives which may belong to me at my death, [*or*, the policies on the lives of A. of &c., B. of &c., and C. of &c.,] and to pay the premiums on such policies respectively out of the annual income of my residuary estate, and to receive in cash the bonuses already accrued or hereafter to accrue thereon respectively, which, when received, shall be held and

Policies of assurance.

Policies of
insurance.

disposed of as part of the corpus of the moneys to arise from the sale of my residuary estate under the trust for sale thereof hereinbefore contained, or to surrender such bonuses as afore-said or any of them in consideration of a proportionate decrease in the said premiums respectively, or to allow such bonuses to be added to the policy moneys, and, in case of a sale or disposition of the said policies, to sell or dispose of the same respectively, either by way of surrender to the office, in consideration of a gross sum of money, or in consideration of new policies for sums to be agreed upon on the lives respectively assured payable on the dropping of such lives respectively, but without premiums in the meantime.

Maintenance
of children
after death of
wife.

AND after the decease of my wife, in trust to apply, in the maintenance and education of each of my children, the income of such child's expectant or presumptive or vested portion under my will, until he or she shall attain the age of twenty-one years, or marry.

Maintenance
and advance-
ment.

I DESIRE and authorize my wife during her widowhood, and after her decease or marriage my trustees, to apply the interest of each child's expectant or presumptive or vested portion in the maintenance and education of such child. I authorize my trustees, if they think fit, to apply not more than one-half of any child's expectant or presumptive or vested portion towards such child's advancement in life or otherwise for his or her benefit.

Mainte-
nance.

I EMPOWER my trustees [*or*, the trustees and trustee for the time being of this my will] to apply all or any part of the income arising from any minor's presumptive share in any part of my property, after the death of the preceding owner for life thereof, if any, for the maintenance and education of each such minor, notwithstanding that the father of such minor may be living and able to provide the same. And I direct my trustees [*or*, the said trustees and trustee] to invest and accumulate the unapplied income in augmentation of the capital of such share. I also authorize my trustees [*or*, the said trustees and trustee] to apply, but with the consent of the life-owner for the time being, if any, any part not exceeding one-half of the presumptive or vested share of any person under this my will, for his or her

Irrespective
of parent's
ability to
maintain.

Advance-
ment.

advancement in the world. And I empower my trustees [*or*, Payment to parent or guardian. the said trustees and trustee] for the purposes aforesaid, to pay such income, or the money so to be raised, unto the parent or guardian for the time being of any such minor as aforesaid, without being in anywise answerable for the application thereof.

I DIRECT that my trustees, with the consent of my wife, if she be living, and after her decease in their own discretion, may advance for the benefit of each of my children a moiety or less of such child's expectant share. Advancement.

I DECLARE that, in order to render the power of advancement hereinbefore contained available in respect of the share of each or any child, grandchild, or other issue of the said A. B., of and in the said hereditaments and premises hereinbefore devised, before the sale of the whole thereof, it shall be lawful for my said trustees or trustee, with such consent or in such discretion as aforesaid, to determine the value of such share, and to raise the whole or any part of such value, by exercising the powers of mortgaging and charging hereinafter contained, and to apply the money to be so raised pursuant to the power of advancement hereinbefore contained, but so that the total amount of the money to be applied for the advancement of any one such child, grandchild, or other issue, shall not, in the opinion of my said trustees or trustee, exceed one-half of the value of his or her vested or presumptive share of the said trust fund. Trustees to determine the value of the share of each beneficiary.

AND I DIRECT that the trustees or trustee for the time being of the same term shall raise and apply for the maintenance and education of my child or children, presumptively entitled to a portion or portions under the said settlement and this my will, interest upon their respective portions in manner following, that is to say: for each son under the age of twelve years, interest after the rate of one per cent. per annum; for each son above the age of twelve years, and under the age of sixteen years, two per cent. per annum; and for each son above the age of sixteen years, three per cent. per annum; and for each daughter under the age of twelve years, one per cent. per annum; and Maintenance by a percentage on portions.

for each daughter above the age of twelve years, three per cent. per annum; until their respective portions shall become vested, or they respectively shall previously die.

Advancements in testator's lifetime to be brought into account.

I DECLARE that the sum of £——, which I have applied for the benefit of my said son ——, shall be taken as a satisfaction to that extent of the portion provided for him by my will; and further, that all other advances which I may hereafter make for the benefit of any of my children, to the amount at any one time of £——, shall be in part satisfaction of the portions hereby provided for them.

Investment of trust moneys, general directions as to.

I DIRECT that all investments of trust money under the trusts or provisions of this my will, shall be made by my trustees or trustee in their or his names or name, in or upon some one or more of the investments or securities following, that is to say, the public stocks or funds, or government securities of the United Kingdom, freehold, copyhold or leasehold securities in England, Wales or Ireland, such leaseholds if for years having not less than sixty years unexpired at the times of the investments thereon respectively, and the stocks, funds, shares, debentures, mortgages or securities of any corporation, company or body municipal, commercial or otherwise, in the United Kingdom or India, or any colony or dependency of the United Kingdom. AND I DECLARE that my trustees or trustee may, from time to time, vary or transpose such stocks, funds, shares and securities, into or for any other or others of the same or a like nature, NEVERTHELESS I direct that where any person shall be entitled to receive, as owner for life, the income of the said trust moneys when invested, the investment shall not be made or varied without the previous consent in writing of such person.

Leaseholds to be subject to future rents, &c.

I DIRECT that the leasehold estates hereby bequeathed shall respectively be subject, in exoneration of my other estate, to the payment by the several legatees thereof of all rents and sums of money which shall become due after my death, in respect of such several leasehold estates, under the leases or demises thereof respectively, except that my executors shall pay the ap-

portioned part of rent, insurance and other outgoings, for the fractional part of the current year, half year, or quarter unexpired at the time of my death.

I DECLARE that the marriage, after my death, of any and every infant female beneficiary under this my will, in order that her interest under the trusts hereinbefore declared may vest on such marriage, shall be solemnized with the prior consent in writing of the parents or parent, guardians or guardian for the time being of such infant female.

Marriage to be with consent of parents or guardians.

I FURTHER DECLARE that in the meantime, until the sale of the real estate hereinbefore devised, the same shall, for the purposes of all the trusts and provisions hereinbefore contained in favour of my children and issue, be considered as money or personal estate, and be transmissible accordingly, and the rents and profits thereof shall be received by the trustees or trustee for the time being of this my will, and be applicable to the same purposes and in the same manner as the yearly produce of the moneys, stocks, funds or securities to be produced by the sale or sales thereof would be applicable by virtue of this my will, if such sale or sales had actually taken place, and the proceeds thereof had been duly invested pursuant to the provisions of this my will.

Land till sold to be considered as money.

Rents and profits till sale.

I DECLARE that my widow shall not be entitled to dower out of any tenements or hereditaments of or to which I at the time of my decease shall be or have been seised, possessed or entitled.

Declaration as to widow's dower.

I DECLARE that the provision hereby made for my said wife shall be accepted by her in full satisfaction of her claim to dower or free-bench out of any real estate of which I have been or now am or shall be seised.

Provision in lieu of wife's dower.

I DECLARE that the provision hereby made for my said wife is intended to be in satisfaction of the jointure to which she will be entitled after my decease, by virtue of the settlement made upon my marriage, and that the said provision is hereby made upon condition that my said wife do, at the request of my

Provision in satisfaction of wife's jointure.

trustees or trustee, but at the costs of my estate, effectually release the hereditaments charged with the said jointure from all claims and demands in respect thereof.

Accruing
shares, gen-
eral directions
as to.

I SUBJECT the accruing shares of each of my said daughters under the trusts and provisions of this my will, to all the trusts and provisions herein contained concerning the original sum of £—, hereby given to or in trust for each such daughter, inclusive of this clause.

Devise of
mortgage
and trust
estates.

I DEVISE all the real (*m*) estates which shall, at my decease, be vested in me as mortgagee or trustee, to my said trustees, their heirs and assigns, subject to the equities affecting the same respectively.

Devise of real
mortgage and
trust estates,
with power
to appoint.

I DEVISE all the real estate which at my death shall be vested in me upon any trust or by way of mortgage, To SUCH USES as the said — and —, or the survivor of them, shall by deed appoint, and in default thereof, To THE USE of the said — and —, and their heirs, for the estates which I have therein, upon the trusts to which the same are subject.

Power to
postpone con-
version of
hazardous
investments.

I EMPOWER my trustees, notwithstanding anything hereinbefore contained, at their discretion, to continue all or any part of my personal estate in the state or investments in or upon which the same shall be at the time of my decease, however doubtful or hazardous (*n*) or limited the description or nature of the property or investment may be, or otherwise to call in and compel payment, or sell and dispose of the same, and to lay out and invest the moneys to be thereby raised, and

Investment.

(*m*) See 1 Jarm. Wills, 668, 672.

Shares and
other specu-
lative pro-
perty.

(*n*) This power is absolutely necessary in the case of a testator who leaves shares or other speculative property which at the time of his death may be at a low price or almost unsaleable in the market, but as to which reasonable expectations may be entertained of an increase in value. If no such power is introduced, the executors must realise the depreciated investments within twelve calendar months after the testator's death; see *ante*, p. 468.

all other moneys to be from time to time received by them under the trusts or powers herein declared and contained in their names, in some or one of the parliamentary stocks or funds of Great Britain, or at interest upon any real securities in England or Wales, and not elsewhere, or upon the debentures or other securities or on mortgage of the stock or shares of any corporation aggregate or chartered company in Great Britain at the times of the investments thereon respectively paying dividends on all shares therein, or upon any securities authorized by Act of Parliament, to be from time to time altered, varied or transposed for or into other stocks, funds or securities of the nature or kind aforesaid, as my trustees shall think proper; which stocks, funds and securities so to be purchased or acquired by my trustees, and the annual income thereof, shall be held under and subject to the same trusts as the trust premises for which the same shall be substituted were or would have been liable to under this my will.

I EMPOWER my trustees to accept the surrender of any lease or otherwise to discharge any tenant of the said trust premises respectively, and to compound or allow time for the payment of or absolutely to abandon and release any arrear of rents or any debts due to my estate, and to satisfy or settle all demands against my estate, whether supported by strictly legal evidence and whether barred by any statutory or other limitation or not, and to refer any matter in difference relating to my estate to arbitration, and generally to settle and determine all accounts and disputes relating to my estate, in such manner and on such terms as my trustees shall deem expedient. AND I ALSO EMPOWER my trustees to employ such agents, collectors of rents and debts, and other persons in and about the management of the said trust premises respectively as they shall think proper, and to pay them such salaries and remuneration as they shall think fit.

General
powers of
manage-
ment.

I DIRECT AND DECLARE that if the said A. B., or any person or persons in his name or on his behalf, or any person or persons claiming through, under, or in trust for him, shall, at any time during the life of the said A. B. or within twenty-one years

Condition not
to dispute
will.

after his death, dispute the validity of this my will (o), or of any of the dispositions herein, or in any codicil hereto, con-

Condition
not to dispute
validity of
will.

(o) In reference to conditions of this class, which are often found in wills, but the validity of which has been a good deal questioned, it may be observed that there is no principle of law which forbids the divesting of an estate or interest taken under a will in the event of the devisee or legatee disputing its validity on the ground of the testator's incompetency to make it, by reason of insanity or any other disability (*Cooke v. Turner*, 14 Sim. 493, 15 Sim. 611; S. C., nom. *Cooke v. Cholmondeley*, 2 M'N. & G. 18). Such a condition, attached to a gift of personalty, will be ineffectual, without a gift over in the event of non-compliance with the condition (see 2 Jarm. Wills, 52). A gift over will not give effect to a condition in itself illegal; but a legal condition appended to the enjoyment of real estate will not be rendered ineffectual by the absence of such a gift. In *Boughton v. Boughton* (2 Ves. s. 12)—where a testator by an informally executed will gave his real estate to A. and a contingent legacy to B. (an infant who in the event became testator's heir-at-law), and added a clause that if any one who should receive benefit by his will should dispute or controvert the whole or any part thereof, he should forfeit all claim under it, and the property so forfeited was given to the residuary legatees—it was held that the heir was put to his election, but should not elect until attaining twenty-one, and in the meantime A., the intended devisee, was allowed to be in possession of the realty, but restrained from committing waste, and liable to account.

As to the
modes of dis-
puting wills.

Will of per-
sonalty.

The origin of the ecclesiastical jurisdiction in all matters relating to the probate of wills of personal property is involved in some uncertainty (see *Dyke v. Walford*, 5 Moo. P. C. 434); until recently, however, it was only in an Ecclesiastical Court (except by special prescription in favour of the lords of certain manors), that the validity of a will of personalty, or of any testamentary paper relating to personalty, could be established or disputed. The Courts of Equity consider the executor a trustee for the legatees, and will compel him to execute his trust in a proper manner; from this claim to enforce a proper performance of the trusts has arisen the jurisdiction of Equity in construing or interpreting a will. The Equity Courts then are the Courts of construction: the grant of probate is evidence merely of the *factum* of the will. The executor however derives his title, not from the probate, but from the will itself—the probate is only the evidence of his title, without the production of which the executor cannot assert or rely on his title in the Courts either of Equity or Law. (As to the Probate Court being incidentally compelled to act as a Court of construction, see *ante*, p. 143).

Probate Act,
20 & 21 Vict.
c. 77.

But by the "Act to amend the Law relating to Probates and Letters of Administration in England," 20 & 21 Vict. c. 77 (amended by 21 & 22 Vict. c. 95), the testamentary jurisdiction of all Ecclesiastical and other Courts was abolished (sect. 3), and "The Court of Probate" established

tained; or if the said A. B. or any such person or persons as aforesaid shall, at any time during such period as aforesaid,

(sect. 4), with full authority to grant or revoke probates of wills and letters of administration, and to hear and determine all questions relating to matters and causes testamentary. The Court is a Court of Record (sect. 23), and has throughout England the same powers in relation to the personalty of deceased persons as the Prerogative Court previously had within the Province of Canterbury, but no suits for legacies or distribution of residues shall be entertained by it: and by sect. 29 the practice of the Court shall, except where otherwise provided by the Act or by the rules or orders from time to time made, be, so far as the circumstances of the case will admit, according to the practice in the Prerogative Court.

Court of Probate.

A testament may be proved either in common form, or in solemn form, *per testes*. Probate may be granted in common form by the district registrars of the Court on the affidavit of the person applying for the same, that the testator, at his death, had a fixed abode within the district; and such probate has effect over the personalty in all parts of England (sect. 46).

Probate in common form;

But the district registrars cannot grant probate where there is contention as to the grant (sect. 48): in such cases the grant must issue from the principal Court. If the validity of the will is disputed, or if the executor have reason to expect any dispute, the will is proved in solemn form; in which case the parties interested are cited to attend, witnesses are examined on oath, and on the evidence adduced the will is pronounced for or against. The Court of Probate may cause questions of fact to be tried by jury before the Court itself (sect. 35), or by means of an issue directed to any of the superior Courts of Law. An appeal lies, with leave of the Court itself, to the House of Lords. Where the personalty is sworn under 200*l.*, and the testator was not possessed of realty of the value of 300*l.*, the Judge of the County Court having jurisdiction at the testator's place of abode has the contentious jurisdiction and authority of the Court of Probate (21 & 22 Vict. c. 95, s. 10): from him an appeal lies to the Court of Probate, whose decision is such cases in final (20 & 21 Vict. c. 77, s. 58).

—in solemn form.

Any interest under a will is sufficient to entitle a person to oppose the will (*Kipping v. Ash*, 4 No. Cas. 177; and see *Dixon v. Allinson*, 3 Sw. & Tr. 572); the opponent may however be put on proof of his interest (see *Crispin v. Dogliani*, 2 Sw. & Tr. 17; L. R., 1 H. L. 301), by the party propounding the will, but not by another party opposing it (*Hingeston v. Tucker*, 2 Sw. & Tr. 596, 31 L. J., Prob. 91); and the bare possibility of an interest is sufficient to entitle the next of kin to oppose it (*Baskcomb v. Harrison* (13 Jur. 1012). A creditor of the testator has no such right, as a creditor (*Menzies v. Pulbrook*, 2 Cur. 845); but if administration has been granted to him, he may then oppose a will, for this purpose taking the place of the next of kin (see 1 Phillim. 159). An executor propounding a will cannot plead in opposition to an earlier will propounded in the

Who may contest a will.

refuse to confirm this my will, or any codicil hereto, so far as he or they lawfully can, or to do such acts and things as of the

same suit any plea but revocation by the will which he propounds (*Parton v. Johnson*, L. R., 1 Prob. 549).

Revocation
of probate.

Where an executor obtains probate in common form, he may, at any time within thirty years, be compelled by any interested party to prove the will in solemn form; and if the evidence be insufficient to support the will, the probate will be revoked. If the will has been proved in solemn form and the next of kin have been cited, they cannot again call upon the executor to prove: but in cases of fraud, or if a later will be set up, the parties interested in the later will may again cite the executor, and obtain the revocation of the probate already granted. And, prior to the Probate Act, a grant of probate by the wrong jurisdiction was a cause of nullity or reversal. As to the mode of procedure in case of the discovery of a will later in date than one in favour of which a suit had been previously concluded, see *Cutto v. Gilbert* (9 Moo. P. C. 131, 18 Jur. 560).

Probate, as
to what, con-
clusive.

Probate, unrevoked, is conclusive in the Courts, both of law and equity, as to the due execution, the appointment of executors, and the validity and contents of the will, so far as it has reference to personalty. Before the Probate Act, probate was no evidence of the validity or contents of a will as to realty; and if a will related exclusively to realty, it was not entitled to probate in the spiritual Courts, nor is such a will entitled to probate in the Probate Court (*Re Drummond*, 2 Sw. & Tr. 8, 8 W. R. 476; and see *Danby v. Poole*, 10 W. R. 515), even though it contain an appointment of an executor who is directed to convert the realty into personalty (*Re Barden*, L. R., 1 Prob. 325, which however seems inconsistent with the later case, *Re Jordan*, Ib. 555). Nor has the Court jurisdiction to grant probate of the will of the sovereign (*Re His late Majesty George III.*, 3 Sw. & Tr. 199, 1 N. R. 69), or of a will disposing only of property in a foreign country (*Re Coode*, L. R., 1 Prob. 449). But by sect. 61 of the Probate Act, where proceedings are taken for proving a will in solemn form, or for revoking probate of a will on the ground of the invalidity thereof, or where in any other contentious cause or matter under the Act the validity of a will is disputed, unless the will affects only personal estate, the heir-at-law, devisees, and other persons having or pretending interest in the real estate affected by the will, *shall be cited* (except in the cases mentioned in sect. 63—the wording of which is peculiar; the two clauses taken together are cumbrous, if not obscure) to see proceedings, and may be permitted to become parties, or intervene for their respective interests in such real estate. And by sect. 62 where a will is proved in the Court of Probate in solemn form, or its validity declared by decree or order in any contentious cause or matter, the probate, decree or order enures for the benefit of all persons interested in the real estate, and the probate copy shall, in all Courts, and in all suits and proceedings affecting real estate of whatever tenure, be received

Probate Act,
s. 61.

Sect. 62.

said A. B. or such person or persons as aforesaid can be reasonably demanded for giving full effect to all or any of such dis-

as conclusive evidence of the validity and contents of the will, in like manner as a probate is received in evidence in matters relating to personalty; and where the invalidity of the will is declared by decree or order of the Court of Probate, such decree or order enures for the benefit of the heir-at-law or other persons against whose interest in the realty the will would have operated, and such will is not receivable in evidence in any suit or proceeding in relation to the realty. There does not appear to be any clause expressly authorizing the Probate Court to direct costs to be paid out of real estate, but inasmuch as the validity of the will as regards real estate is now determined by the result of the litigation respecting probate, it is presumed the Court must have such jurisdiction; and probably the costs would be ordered to be borne rateably by the real and personal estate.

Probate Act,
s. 62.

Costs.

In the case of a will of lands, the validity of the instrument, if it deal also with personalty, may now (as we have seen in the preceding paragraph) be contested in the Court of Probate. This, however, does not abolish, but is in addition to, the previously-existing modes of disputing a will of realty. The validity of a devise, if the Probate Court has not already in a contentious cause or matter pronounced upon the will, may be tested in the Courts of law, by an action of ejectment; or, where ejectment cannot be brought, owing to the existence of an outstanding legal estate, in the Courts of Equity.

Will of
realty: may
be disputed,
where.

Formerly the Court of Chancery took upon itself to determine the validity or invalidity of a will of realty, by inquiry before some of the Masters; but this practice has ceased since the case of *Kerrick v. Bransby* (7 Br. P. 437), in which it was held by the House of Lords that a will could not be set aside in equity for fraud or imposition; because if of personalty, it might be set aside in the Ecclesiastical Court; and if of realty, it might be set aside at law on the issue *devisavit vel non*. Though this method of trying the will continued down to 1727, yet "as early as the time of James I., it appears to have been thought by the Court that the proper mode of trying the validity or invalidity of the will was by a trial at law; but nevertheless, the case being sent to law to be tried, the Court afterwards dealt with it as justice seemed to require" (Kay, 85). And notwithstanding the recent Acts, 21 & 22 Vict. c. 27 and 25 & 26 Vict. c. 42, the remedy of an heir at law is at law, and he cannot sustain a bill in equity to set aside a will, even on the ground of fraud (*Jones v. Gregory*, 2 D. J. & S. 83). The proceeding in equity to establish a will against the heir differs from a trial of its validity or invalidity; and a bill can be maintained by a devisee of the legal estate in real property, who is in possession, for the purpose of establishing the will against: he testator's heir at law, although the heir

Former practice of trying
validity before Masters
in Chancery,

disused since
1727.

Proceeding
in equity to
establish a
will against
the heir,

positions; or if any proceeding whatsoever shall at any time during such period as aforesaid be taken with the consent or

or other
adverse
claimant.

has brought no action of ejectment against the devisee (*Boyse v. Rossborough*, Kay, 71; affirmed, 3 D. M. & G. 817). And such a bill lies against a claimant under a prior will (*Lovett v. Lovett*, 3 K. & J. 1), a devisee being entitled to have the will established, and his title set at rest, not only against the heir, but against all persons advancing adverse claims: but it should seem that, in such a case, the Court will not act without first directing an issue *devisavit vel non* (Ib.; and see *Hopwood v. Lord Derby*, 1 K. & J. 255).

Issue *devisavit vel non*.

The Equity Courts have no original jurisdiction to set aside or to establish a will; but they have an incidental jurisdiction where the party seeking their aid has no other resort; the jurisdiction of Equity to try the validity of a will arises only when there is some impediment (*e. g.* an outstanding term) to proceeding at law (*Wright v. Wilkin*, 4 De G. & J. 141). Where it becomes necessary from the circumstances of the case that equity shall exercise its jurisdiction, the Court will proceed to investigate whether the will was properly made or not; but, generally speaking, will not decree against a will without directing an issue *devisavit vel non* to be tried in a Court of law. The Court may either direct an issue, or order an action of ejectment to be brought: it is, however, at the option of the heir-at-law to have the validity of a will tried in ejectment or by an issue (*Grove v. Young*, 15 Jur. 810): the latter is the more convenient course, because, in directing an issue, the Equity Court has jurisdiction over the whole case, and may grant a new trial or not at its pleasure (*M'Gregor v. Topham*, 3 H. L. C. 132; *Swinfen v. Swinfen*, 27 Bt. 148), whereas in an ejectment, a new trial can be granted only in a Court of law. As to the principles on which the Court of Chancery acts in deciding whether the trial of an issue has or has not been satisfactory, see *Boyse v. Rossborough* (6 H. L. C. 2; 3 Jur., N. S. 373). And as to a trial by a jury before the Court of Chancery, under 25 & 26 Vict. c. 42, see *Williams v. Williams* (33 Be. 306); *Cowgill v. Rhodes* (Ib. 310). For the information, then, of its own conscience, a Court of Equity will direct a trial by jury before making a final decree; if the decree, when made, be against the will, it will either order the will to be delivered up for cancellation, or will grant a perpetual injunction against the devisee. (See *Middleton v. Sherburne*, 4 Y. & C. Ex. 358). In cases where the heir disputes a will *in toto* the ordinary rule of the Equity Courts is to grant an issue to try the question; but if the heir acts under the will, and merely questions its construction, the Equity Court may either determine the point, or grant an issue at its discretion (*Ricketts v. Turquand*, 1 H. L. C. 473). And the heir has been held entitled to an issue *devisavit vel non*, to try the validity of a will disposing of realty, notwithstanding that such will had, as to the personalty, been established by the Privy Council, in proceedings to which the heir was a

connivance of the said A. B., or any such person or persons as aforesaid, by means or in consequence of which any estate or

party as one of the next of kin (*Stacey v. Spratley*, 2 De G. & J. 94; 4 De G. & J. 199).

A decree of the Court of Chancery in Ireland, after a verdict upon an issue *devisavit vel non*, does not determine the validity or invalidity of the will so far as it relates to lands in England (*Boyse v. Colclough*, *Boyse v. Rossborough*, 1 K. & J. 124; Ib. 502: see the same cases on appeal from Ireland, 6 H. L. C. 1).

As to the production of the original will or the probate or an office copy in an action of ejectment or a suit in equity, see sect. 64 of the Probate Act; *Barraclough v. Greenhough* (L. R., 2 Q. B. 612).

20 & 21 Vict.
c. 77, s. 64.

Formerly, a disputed will could not be proved *viva voce*, at the hearing of a suit in Chancery, because the heir was entitled to cross-examine the witnesses, which could not be done in Court under the old system; but under the new practice a will may be proved, and the witnesses cross-examined, in Court (*Chichester v. Chichester*, 24 Be. 289).

Proof of will
in Court.

Under "The Chancery Amendment Act, 1858," 21 & 22 Vict. c. 27, the Court of Chancery may, if it think fit (sect. 3) cause "any question of fact arising in any suit or proceeding to be tried by a special or common jury before the Court itself;" or (sect. 5), "before the Court itself, without a jury."

Chancery
Amendment
Act, 1858
(Lord Cairns'
Act).
21 & 22 Vict.
c. 27.

It has been held that the Act intends a jury to be called *only* where, before the Act, an issue would have been directed (*George v. Whitmore*, 26 Be. 557; *Bradley v. Berington*, 4 Drew. 511; and see *Morrison v. Barrow*, 1 D. F. & J. 639). And the Act does not interfere with the power previously possessed of directing an issue to be tried at law; indeed if either of the litigant parties desires to have the issue tried before a common law Court, the trial, except under special circumstances, will not be directed to take place before a jury in the Equity Court (see *Peters v. Rule*, 7 W. R. 171).

By "The Chancery Regulation Act, 1862" (25 & 26 Vict. c. 42), after reciting that it is expedient that the power of the Court of Chancery to refuse or postpone the application of remedies within its jurisdiction until questions of law and fact have been determined or ascertained in one of the Courts of Common Law should no longer exist, and that every question of law or of fact arising in the Court of Chancery should be determined by or before the said Court itself, it is enacted (sect. 1) that in all cases in which any relief or remedy within the jurisdiction of the Court of Chancery is or shall be sought in any cause or matter instituted or pending in the said Court, and whether the title to such relief or remedy be or be not incident to or dependent upon a legal right, every question of law or fact, cognizable in a Court of Common Law, on the determination of which the title to such relief or remedy depends, shall be determined by or before the Court of Chancery. Provided always (sect. 2), that where

Chancery
Regulation
Act, 1862
(Sir J. Roll's
Act).
25 & 26 Vict.
c. 42.

interest could be in any way attainable by the said A. B., or any person or persons in his right, of larger extent or value than is or shall be by this my will, or any codicil hereto, given to the said A. B., and such proceeding shall not be formally and at once disavowed, stayed or resisted by the said A. B. and such other person or persons as aforesaid to the full extent of his or their power and ability so to do; THEN and in any such case all the dispositions herein, or in any codicil hereto, contained in favour of the said A. B. shall cease and be void to all intents and purposes whatsoever, and are hereby revoked

25 & 26 Vict.
c. 42.

questions of fact may be more conveniently tried at assizes, issues may be directed. The provisions (sect. 3), with reference to the trial of questions of fact, of "The Chancery Amendment Act, 1858," apply to this Act; and (sect. 5) nothing in this Act affects the power of the Judges of the Court of Chancery to sit with the assistance of a Judge of any of the Courts of Common Law. But by the 4th section it is provided, "that in all cases in which the object of any suit in equity shall be to recover or to defend the possession of land under a legal title, or under a title which would have been legal but for the existence of some outstanding term, lease or mortgage (and whether mesne profits or damages shall or shall not also be sought in such suit), such relief shall only be given in equity as would have been proper according to the rules and practice of the Court if this Act had not passed; and nothing in this Act shall make it necessary for a Court of Equity to grant relief in any suit concerning any matter as to which a Court of Common Law has concurrent jurisdiction, if it shall appear to the Court that such matter has been improperly brought into Equity, and that the same ought to have been left to the sole determination of a Court of Common Law."

As to the effect of and the power of the Court under this Act, see *Re Hooper's Estate*, *Baylis v. Watkins* (1 N. R. 115); *Davenport v. Jepson* (1 N. R. 173, 307, 471); *Egmont v. Darell* (1 H. & M. 563); *Eaden v. Firth* (Ib. 573); *Fernie v. Young* (L. R., 1 H. L. 63).

Forged will,
purchaser for
value without
notice.

As to the title which may be obtained under a forged will by a purchaser for value without notice, who gets in an outstanding legal estate, see *Jones v. Powles* (3 M. & K. 581); and under an earlier will where a later will is subsequently discovered, *Carter v. Carter* (3 K. & J. 617).

Penalty for
fraudulent
destruction
or conceal-
ment of will.

A person who in the life of the testator or after his death steals, or for any fraudulent purpose destroys, cancels, obliterates or conceals the whole or any part of a will, codicil or other testamentary instrument relating to real or personal estate, or both, is guilty of felony, and liable to penal servitude for life (24 & 25 Vict. c. 96, s. 29). And as to the punishment of a vendor or mortgagor for fraudulent concealment of a will, see 22 & 23 Vict. c. 35, s. 24.

accordingly. AND (in the event lastly hereinbefore contemplated) as to all the real estate so forfeited as aforesaid, I GIVE and devise the same unto the said P. and Q. [*trustees of will*] and their heirs, to hold the same in the same manner, and subject to the same trusts, powers, provisos and limitations as are herein declared, provided and limited of or concerning my residuary real estate. AND as to all the personal estate so forfeited as aforesaid, I GIVE and bequeath the same unto Z., his executors, administrators and assigns absolutely.

I EMPOWER my said trustees (*p*) to give receipts for all moneys and effects to be paid or delivered to them by virtue of my will, and declare that such receipts shall exonerate the persons taking the same from all liability to see to the application or disposition of the moneys or effects therein mentioned. Receipt clause.

AND I EMPOWER my trustees (*p*) to give receipts for all moneys which shall become payable under any of the trusts or powers aforesaid, or which shall otherwise accrue due to my estate. And I declare that such receipts shall exonerate the persons taking the same from all liability to see to the application of the money therein mentioned, And that no purchaser or mortgagee of the said trust premises respectively, or any part thereof, nor any person claiming through or under any such purchaser or mortgagee, shall be bound to ascertain or inquire whether the trusts hereby declared, or any of them, be then continuing, or otherwise into the validity, propriety or expediency of any sale or mortgage which shall be made of the same premises respectively or any part thereof by my trustees. And further I empower my trustees to authorize and concur in any sale, mortgage or other disposition of the said trust premises respectively, freed and discharged from my debts and legacies and other charges imposed thereon by this my will, though such disposition be made by the person or persons who shall then be beneficially entitled to the said premises under the trusts aforesaid, and the sale or mortgage moneys, if any, be wholly paid to such person or persons for his, her or their own use. Special receipt clause.

(*p*) See *ante*, p. 437, n.

Special re-
ceipt clause.

I DECLARE that every receipt which shall be given by the said P. Q. and R. S., or the survivor of them, his executors or administrators, or other the trustees or trustee for the time being of this my will, or their or his agent or agents, for the whole or any part of the money to be given for the purchase of the said hereditaments and premises hereby made saleable, or for enfranchisement, or for equality of exchange or partition, or for any other moneys which may be paid to them or him, under or by virtue or in the execution of any of the trusts or powers hereof, shall be an effectual discharge to the person or persons paying the same for so much money as in any such receipt shall be expressed to be received, and that after taking such receipt the person or persons aforesaid shall not be obliged to see to the application, or be accountable for the misapplication thereof.

Proviso as to
partitioned
and ex-
changed
land.

PROVIDED ALSO that no person or persons who shall convey or assure any hereditaments or undivided parts of hereditaments given in exchange or allotted upon partition to the trustees or trustee for the time being of my will, shall be bound to see to the settlement of the said hereditaments respectively, nor shall any such exchange or partition be affected by the want of any or a proper settlement thereof.

Clause nega-
tivating the
powers, &c.
given by 23
& 24 Vict.
c. 145, ss.
1—26.

I DECLARE that none of the powers or incidents conferred on or annexed to particular offices, estates or circumstances, by sections 1 to 26 (inclusive) of the statute 23 & 24 Vict. c. 145, entitled "An Act to give to Trustees, Mortgagees and others certain Powers now commonly inserted in Settlements, Mortgages and Wills," shall take effect or be exerciseable over any property comprised in or by any persons or person acting under this my will (*y*).

Clause nega-
tivating the
powers of in-
vestment
given by
22 & 23 Vict.
c. 35, 23 & 24
Vict. cc. 38
and 145.

I DECLARE that none of the powers of investment conferred on or annexed to the office of trustee or executor by the Act 23 & 24 Vict. c. 145, entitled "An Act to give to Trustees, Mortgagees and others certain Powers now commonly inserted

(*y*) See *ante*, pp. 106, 138, 226, 390, 401, as to the powers whose operation is hereby negatived; and pp. 112, 116, 129, as to powers conferred by the subsequent sections of Lord *Cranworth's* Act, whose operation is not excluded.

in Settlements, Mortgages and Wills," shall take effect or be exerciseable by any trustees or trustee, executors or executor, acting under this my will; and I forbid my trustees or trustee, executors or executor, to invest any trust moneys coming to their respective hands in any securities other than those hereinbefore specified and authorized (z).

I DECLARE that none of the powers conferred on the Court of Chancery (a) by the Act 19 & 20 Vict. c. 120, entitled "An Act to facilitate Leases and Sales of Settled Estates," or by any Act amending or extending the provisions thereof, shall be exercised over or in relation to any settled estate comprised in this my will. AND I further declare that it shall not be lawful for any person or persons claiming under or by virtue of this my will to make any such demise (b) as in the absence of this declaration would be authorized by the 32nd section of the said Act of the 19 & 20 Vict. c. 120.

Clause negativing the powers of the Settled Estates Act.

I DECLARE that the provisions of the Act of Parliament, 17 & 18 Vict. c. 113, entitled "An Act to amend the Law relating to the Administration of the Estates of deceased Persons," or of any Act explanatory thereof, shall not be applicable to the administration of my estate (c), my intention being that the

Clause negativing the operation of Locke King's Act.

(z) See *ante*, pp. 103—108.

(a) The powers conferred on the Court by the Settled Estates Act are for the most part of a beneficial and remedial nature; and the Act itself prescribes various precautions and restrictions to prevent an improper exercise of such powers. Cases may occur in which it is desirable to exclude the operation of the Act; but they will probably not be frequent, and the first clause of this Precedent should not be hastily adopted.

(b) See *ante*, p. 177, n. (c), as to the power conferred by this section on tenants for life, &c. to grant leases for twenty-one years. In some cases, *e. g.* of land likely, within a short period, to become valuable for building purposes, this negative clause would be necessary, since a lease for twenty-one years would for that term keep such land out of the market.

(c) See *ante*, pp. 254—258. If the intention be simply to negative the application of the Act, the concluding part of the Precedent is unnecessary; but it is apprehended that the latter, if inserted, would operate as an adoption by the testator of any incumbrances subject to which the property had been purchased by or had devolved upon him, and would thus prevent the raising of the difficult question adverted to at p. 255.

several devisees of my real estate shall take the same exonerated from any mortgage debts or debt which at the time of my death may affect the said real estate or any parts or part thereof.

Mutual
wills (*d*).

I, Mary Johnson, of Sheffield, spinster, by this my will made this — day of — 18—, give all my realty and personalty to my sister Jane Johnson, whom I appoint my executor. In witness, &c.

I, Jane Johnson, of Liverpool, spinster, by this my will made this — day of — 18—, give all my realty and personalty to my sister Mary Johnson, whom I appoint my executor. In witness, &c.

Mutual wills;
mistake.

(*d*) Where two sisters wished to make mutual wills, each to give all her property to the other, so that the survivor might be entitled to all the property of both, but by mistake each signed the will intended for the signature for the other, and the mistake was not discovered till after the death of one, it was held that the deceased had died intestate (*Re —*, 14 Jur. 402).

Mutual wills
and joint
wills.

Mutual wills, *i. e.* separate instruments made by two persons in favour of each other (see *Hinchley v. Simmons*, 4 Ves. 160), must not be confounded with a joint will, *i. e.* a single instrument made by two persons, and intended by them to operate as the will of both. The term "mutual will" is sometimes applied to the latter kind of instrument; but the law of this country does not recognise such a document as a will (*Hobson v. Blackburn*, 1 Add. 277; and see *Deane, Wills*, 21; *ante*, p. 145), though it may be valid in equity as a contract (*Dufour v. Pereira*, 1 Dick. 419).

See also *Price v. Dewhurst* (8 Sim. 279, 4 M. & C. 76); *Lord Walpole v. Lord Oxford* (3 Ves. 402).

Agreement
to leave pro-
perty by will,
enforced.

That an agreement to leave property by will may be enforced, see *Loffus v. Maw* (3 Gif. 592; and see 8 Jur., N. S., pt. 2, p. 281); *Ridley v. Ridley* (6 N. R. 11).

Survivorship,

Where a person dies possessed of real or personal estate, the heir-at-law or the next of kin respectively is entitled, unless the property can be shown to have passed to another by a valid and effectual disposition or by survivorship. Thus where husband and wife are drowned in the same shipwreck, in the absence of any evidence of survivorship, the next of kin of the husband is not entitled to the wife's property (*Satterthwaite v. Powell*, 1 Cur. 705; see also *Re Murray*, *Ib.* 596). And in the case of *Underwood v. Wing* (19 Be. 459, 4 D. M. & G. 633), where husband and wife, after executing mutual wills, each for the benefit of the other, were both swept into the sea by the same wave, and neither was again seen, the

evidence of,
required,
when deaths
by same cala-
mity.

IN WITNESS whereof I have hereunto set my hand this — day of — 18—.

Testimonium clauses;
—will on one
sheet of
paper.

IN WITNESS whereof I have hereunto set my hand and seal (e) this — day of — 18—.

Court, rejecting all speculations arising from the sex, strength or age of the parties, held that there was no evidence of survivorship, and, in the absence of such evidence, would not presume survivorship; and this decision was affirmed by the House of Lords (*Wing v. Angrave*, 8 H. L. C. 183); and see *Barnett v. Tugwell* (31 Be. 232). See also as to survivorship, *Re v. Dr. Hay* (*General Stannix's case*), 1 W. Bl. 640; Fearn's Posth. Works, 38; 1 Taylor, Evidence, 201; *Ommaney v. Stilwell* (23 Be. 328); *Re Wainwright* (1 Sw. & Tr. 257); *Re Ewart* (Ib. 258); *Re Peck* (2 Sw. & Tr. 506); *Re Smith* (Ib. 508, 10 W. R. 586). Persons claiming property as next of kin to a deceased intestate, and showing their kindred, are entitled in the absence of evidence that a person dead and nearer of kin to the intestate survived him; the *onus* rests on those claiming through a deceased nearer of kin to the intestate to show that such deceased survived the intestate (*Re Green's Settlement*, L. R., 1 Eq. 288).

Survivorship.

There is no absolute presumption of law as to the continuance of life (*Lapsley v. Grierson*, 1 H. L. C. 498). The first presumption of law is that a man, who was living at a given period, is alive at a subsequent time within a reasonable limit (see *Re Tindall's Trust*, 30 Be. 151). The *onus* of showing that a person was not alive at a given time, lies on the party asserting that he was not (*Lambe v. Orton*, 8 W. R. 111). But if a person has not been heard of for seven years, the presumption is that he is dead (*Doe v. Jesson*, 6 Ea. 80; *Ommaney v. Stilwell*, 23 Be. 332; *Re Turner*, 3 Sw. & Tr. 476; but see *Watson v. England*, 14 Sim. 28; *Re Creed*, 1 Drew. 235; *Bowden v. Henderson*, 2 S. & G. 360); but he cannot be presumed to have died at any particular period during the seven years (*Dunn v. Snowden*, 2 Dr. & S. 201; *Thomas v. Thomas*, Ib. 298; *Re Benham's Trust*, L. R., 4 Eq. 416).

Presumption
as to continu-
ance of life.

As to the presumption of death at sea, see *Re Norris* (1 Sw. & Tr. 6): where A. sailed from Nelson (New Zealand) in a vessel bound for Sydney; the vessel never reached Sydney, and after inquiry made, no intelligence could be obtained as to the vessel or any of those on board. It was held that the death of A. was to be presumed. The payment by underwriters of a policy of insurance on the vessel is strong evidence in favour of such presumption (*Re Main*, 1 Sw. & Tr. 11; *Re Bishop*, Ib. 303, 28 L. J., Prob. 93).

Death at sea.

(e) As to the necessity for a seal in the case of a will exercising a power, see *ante*, pp. 25, 102.

Testimonium.
—will on several sheets.

IN WITNESS whereof I have signed my name at the end of this my will contained in this and the preceding [*four*] sheets of paper, this — day of — 18—.

[*The testator's name to be signed here*] (*f*).

—will executed in duplicate.

IN WITNESS whereof I have to this my will contained in — sheets of paper, and also to a duplicate hereof, set my hand this — day of — 18—.

—acknowledgment of signature by testator.

IN WITNESS whereof I have, in the presence of the two subscribing witnesses, acknowledged as my signature the signature at the end of this my will, contained in this and the [*four*] preceding sheets of paper, the day and year first hereinbefore written.

—signature by amanuensis.

IN WITNESS whereof, E. F., of &c., has in my presence and by my direction, and in the presence of the two subscribing witnesses, signed my name at the end of this my will contained in this and the [*four*] preceding sheets of paper, this — day of — 18—.

Attestation clauses.

SIGNED by A. B., of &c., gentleman, as and for his last will and testament, in the sight and presence of us, together present at the same time, who in his sight and presence, at his request and in the presence of each other, have subscribed our names as attesting witnesses.

T. B., of —, Solicitor.

H. B., of —, Merchant (*g*).

—signature by testator himself.

WE, the undersigned, have attested the execution of the foregoing writing by A. B., of &c., signing his name thereto as his last will, in the sight and presence of us, present at the same time, and, without quitting his sight or presence, we subscribe the same in the presence of each other, the alterations opposite

(*f*) See as to the position of the testator's signature, and the ceremonies attending the execution of a will, the notes to sect. 9, *ante*, pp. 9—23.

(*g*) See *ante*, p. 4, n. (*f*), where a case is suggested in which three witnesses may be held to be necessary.

to which respectively our initials are placed in the margin Attestation.
having been first made.

WE, the undersigned, have attested the execution of the foregoing writing by A. B., of &c., acknowledging as his signature the signature at the end thereof, in the sight and presence of us, together present at the same time; and we in his sight and presence, at his request and in the presence of each other, subscribe our names as witnesses.

—acknowledgment of signature by testator.

WE, the undersigned, have attested the execution of the foregoing writing by E. F., of &c., signing the name of A. B., of &c., at the end thereof, in his sight and presence, and by his direction, and in the sight and presence of us, together present at the same time; and we, in the sight and presence of the said A. B., at his request and in the presence of each other, subscribe our names as attesting witnesses.

—signature by amanuensis.

MEMORANDUM, that the interlineation between the — and — lines in the — page of this my will, and the alteration in the — line of the — page thereof, and the obliteration in the — line of the same page, were made according to my desire. As WITNESS my hand the — day of —, 18—.

Memorandum and attestation of alterations, on same paper as will.

[Signed] A. B.

Signed by the said A. B. in the sight and presence of us, both present at the same time, who, in his sight and presence, at his request, and in the presence of each other, have hereunto subscribed our names as attesting witnesses.

C. D., of &c.

E. F., of &c.

FOR the words “————” through which I, A. B., have drawn my pen [or, which I have caused to be erased] it is my will that the words “————” be substituted and inserted.

Marginal alteration.

[Signed] A. B.

Signed, &c. [*as in last precedent*].

Memorandum of alterations, interlineations and re-execution.

I, A. B., have made, in my own handwriting [*or*, have caused to be made] in this my will, the alterations hereinafter specified, that is to say, in the — line from the top of the — page, the words “———” are erased, and the words “———” are inserted in their stead. The words “———” in the — line from the bottom of the — page, and the — and — lines from the bottom of the same page, are erased. Between the words “———” and “———” in the — line from the top of the — page, the words “———” are inserted. I DECLARE the above writing, so altered, to be my will.

[Signed] A. B.

Signed, &c. [*as in last precedent*].

Revocation of will.

I, A. B., of —, do hereby REVOKE my will of the — day of —, 18—.

[Signed] A. B.

Signed, &c. [*as in last precedent*].

I, — of —, do hereby revoke all the dispositions of my property contained in an instrument bearing date the — day of —, 18—, and purporting to be my last will, which instrument I at the time of the execution thereof deposited with Messrs. — of —, Solicitors.

[Signed] A. B.

Signed, &c. [*as in last precedent*].

Revival of will revoked by marriage; — on same paper with the will.

I, A. B., of &c., hereby confirm the above will, this — day of —, 18—.

[Signed] A. B.

Signed by the said A. B., of &c., in the sight and presence of us, both present at the same time, who, in his sight and presence, at his request, and in the presence of each other, have hereunto subscribed our names as attesting witnesses; and such signature by the said A. B., and by us as witnesses, took place between one and two o'clock in the after-

noon of Monday the — day of —, 18—, after (*h*) the completion, on that day, of the ceremony of marriage between the said A. B. and Mary now his wife.

J. K., of &c.

L. M., of &c.

WHEREAS I, A. B., of —, made my will on the — day of —, 18—, and have since intermarried with —, I hereby revive and confirm the said will this — day of —, 18—. —on a separate paper.

[Signed] A. B.

Signed, &c. [*as in last precedent but one*].

THIS IS A CODICIL to the will of me, —, which will bears date the — day of —, 18—. WHEREAS since the date of the said will I have intermarried with —, NOW I HEREBY give to my said wife for her life the annual sum of £—, to commence from the day of my death, and to be paid to her by equal half-yearly payments, with a proportionate part thereof down to her death, and I declare that my children by my said wife shall participate equally with my other children in my general real and personal estate, according to the trusts of my will. IN all other respects I CONFIRM the said will. Dated this — day of —, 18—. Codicil made after marriage.

WHEREAS I, A. B., of —, made my will, dated the — day of —, 18—, and have since revoked the same; now I hereby ANNUL such revocation, and DECLARE that the said will is valid and subsisting. Dated this — day of —, 18—. Codicil reviving a will previously revoked.

A CODICIL to the will dated the — day of —, 18—, of me, A. B., of &c. My son W. having since the date of my said will died without leaving issue, I DIRECT that the property comprised in the specific and pecuniary devises and bequests contained in my said will to or in favour of my said son W. shall fall into my residuary estate, AND that my said will shall Codicil.

(*h*) See *Otway v. Sadleir*, ante, p. 31.

take effect as if in the residuary devise and bequest (i) therein contained the names of my two children T. and H. were substituted for the names of my three children the said W., T. and H. I CONFIRM my said will in all other respects. Dated this — day of —, 18—.

(i) In this case, if the testator, who had by his will given his residuary real and personal estate equally amongst his three sons *by name*, had died without making this codicil, the death, in his lifetime, of one of the three sons, without leaving issue who survive the testator, would have caused an intestacy as to one-third of the residue.

SUGGESTIONS

TO

PERSONS TAKING INSTRUCTIONS FOR AND
PREPARING WILLS.

OF all the duties which devolve upon the legal practitioner, none, perhaps, so imperatively demands the exercise of a wise discrimination as that of taking instructions for and preparing a will. Intending testators too often postpone the testamentary act until they are prevented by disease or physical weakness from explaining in detail to their professional adviser the situation of themselves, their family and their property, and to the discretion of that adviser the particular provisions of the instrument are left. Indeed, many persons are ignorant of the ordinary modes of disposition under similar circumstances of family and property, and require to be advised as to the plan best adapted to those circumstances; and he who would efficiently discharge this important branch of a lawyer's duty should be prepared with some sound and well-considered notions on the subject. This perhaps will be facilitated by suggesting some of the particulars on which accurate information should be obtained in taking instructions for a will, and by pointing out briefly the comparative advantages of the several modes of testamentary disposition adapted to ordinary circumstances.

It is obvious that the nature of the inquiries in every case must be greatly regulated by the situation in life and other circumstances of the intending testator. It is equally obvious that on the part of the latter there should be that full confidence which induces him to explain his position to his professional adviser without concealment and without reserve.

Instructions,
from whom
to be taken.

1. Instructions for a will should, if possible, be taken from the testator himself, rather than from third persons, especially where such persons are interested.

Inquiries as
to matters
personal to
the testator.

2. Full inquiry should be made as to the personal position of the testator himself, of his family, and of the objects of his bounty.

Is the testator legitimate or illegitimate? Is he married or unmarried? If married, when? and was a marriage settlement executed? Is there any doubt of the fact or of the legality of his marriage? or of the legitimacy of any of his children or other objects of his favour? Is there a probability of the birth of other children? Is there any question as to the place of domicile of the testator, or of any of the objects of his bounty? Is the testator engaged in trade? in partnership either in his general business, or in a particular adventure?

Nature and
extent of tes-
tator's pro-
perty.

3. Full inquiry should be made as to the nature and extent of the testator's property.

Where is the realty (if any) situate? Is it freehold, leasehold or copyhold? What the precise interest of the testator therein? and how did he acquire it? Is any of it mortgaged? Has the testator contracted to sell or buy any real estate? Is any of the realty to be specifically devised? Has the testator any powers of appointment? Is any provision to be made for carrying on his trade? Is the testator a trustee? or mortgagee? Is any special fund to be appropriated for the payment of debts and legacies? Is he a shareholder in joint stock companies?

Let it now be supposed that the person taking instructions for the will has fully and accurately acquainted himself with the situation of the testator's family and other intended objects of his bounty, and of the property upon which his will is designed to operate.

Objects of
gift.

I. As to the objects of gift.

Where a testator is married but has no child, provision should nevertheless be made for children hereafter to be born (unless it be unreasonable to contemplate his having children by his present wife), or the will should expressly be made contingent on his leaving no issue surviving him. Similarly, pro-

visions for the children of a married testator should not be confined to those *in esse* at the date of the will.

An immediate legacy to the widow, to defray the current expenses of the family, is generally proper. In making a permanent provision for the widow, it is to be considered whether the testator will give her a life income only, or an absolute transmissible interest in any portion of his property. The law, in its provision for widows, furnishes an example of each mode: dower, which is the widow's provision out of the realty, being a life interest; and her share in the personalty, under the Statute of Distributions, being an absolute property. The former mode of provision seems in general most consistent with testamentary arrangements, especially where there are children, whom the testator commonly intends shall take ultimately the bulk of his property. Indeed, even the life interest of the widow is frequently made to cease on her marrying again, where the testator has children, to whom such an event might be prejudicial; otherwise perhaps the restriction is not ordinarily to be recommended.

Provision for widow.

Where the testator was married before 2nd January, 1834, the will should contain an express declaration whether or not the widow is to take the benefit given to her in lieu of her dower.

If any of the testator's children are minors, or are otherwise incapable of providing for themselves, it is advisable to charge the widow (if she takes a life interest in the whole property) with the obligation of maintaining them, unless the testator feels himself secure in leaving this duty to the spontaneous exercise of parental affection. It may sometimes be desirable also to confide to the widow, when she takes only a life interest, and there is a gift over to children equally and absolutely, a power *by will* to regulate and modify the shares of the children, so as to adapt them to any change of circumstances occurring in her lifetime; and such power, if confided, should extend to enable the donee to appoint to more remote issue; for various circumstances (such as the bankruptcy, imprudence, or mental imbecility, of a child) might render it advisable to exclude him from any share, and substitute his issue as objects of the testator's bounty. Another salutary effect of such a power is,

Widow's position in regard to testator's children.

that it imposes some check on the sale or mortgage by the children of their reversionary interests.

If it is deemed advisable that the children should take some benefit in possession during their mother's lifetime, a certain portion of their shares (say a moiety or a third) may be made to vest in possession at majority or marriage in the lifetime of the widow, or (which is more common) a pecuniary legacy may be given to them, payable at majority or marriage; and this more especially deserves consideration, if the children's shares are made contingent (but this is seldom advisedly done) on their surviving the testator's widow, and she has no power of appointment by deed or of advancement, as she would then be unable to accelerate the payment of the children's shares.

Provisions
for children.

The mode of providing for children is of course a more fertile, and therefore more difficult, topic of remark; but, before offering any suggestions on this head, it should be observed, that, where a testator is about to provide for his wife and children, it should be ascertained whether they take any and what interests under any marriage or other settlement of the testator, which may greatly influence the dispositions in the will. Testators often treat settled property as their own; and the assertion by some of the legatees of their claims under the settlement deranges the testamentary scheme, and gives rise to nice questions concerning the doctrine of election.

Election.

As to the advancement
of, and loans
to, children.

Another point to be ascertained is, whether any of the children have been or are likely to be advanced by the testator in his lifetime, and whether such advancements are to be deducted out of their shares, and whether any children, to whom money may have been advanced by way of loan, are to be treated as debtors of the estate in respect of such advances or not.

Period of
vesting of
children's
shares.

The shares of sons are in general made to vest absolutely at majority, and those of daughters at majority or marriage; and the advantage of this plan is, that, if they afterwards die during the life of the widow (whom we suppose to take a life interest), the provision does not fail by such event, but devolves upon their personal representatives. If the vesting of the shares is postponed until the death of the widow, care should be taken that the issue of such of the children as antecedently die are made to stand in their parent's place, though even this is less

Postponement of vesting until widow's decease, inexpedient.

eligible than making the shares vest at majority or marriage ; because, by the latter plan, a child marrying in the lifetime of the widow is enabled to make a settlement upon (see *post*, p. 519), and to communicate a benefit to, the objects of such marriage.

If any of the children are or may be under age when their expectant shares fall into possession, provision should be made for the application of the income for their maintenance during minority.

Maintenance
of infants.

Where all the intended objects are adult, and are to take absolute shares, the will may be very simple in its form, as the disposition in favour of the children will consist of a mere absolute trust ; and, indeed, unless the widow takes a previous life or other temporary interest, there will be no occasion for any trust at all. The whole of the testator's property may (but see *post*, p. 520) be given to his children, in equal or (as the intention may be) unequal shares.

Where, however, any of the children are daughters who are married, it is generally advisable that their shares should be subjected to such trusts as will take them out of marital control. There are two modes of effecting this : one, by simply giving the share in question (supposing it to be personal estate), in trust for the daughter for her separate use absolutely, which has the effect of authorizing the executors to pay or transfer the fund or property to the daughter, without the concurrence of the husband ; but does not prevent the daughter herself from handing it over to the husband ; so that the testator's object is but inadequately attained by a simple trust of this nature. In order effectually to exclude marital influence in the affair, the power of the daughter herself must be curtailed ; to effect which (being the other of the plans above referred to), it is usual to vest the property in trustees for the daughter during her life, and, while married, for her separate and inalienable use, and, after her decease, in trust for her children or more remote issue, as she shall appoint ; and, in default of appointment, in trust for children equally ; and in default of children, in trust for such persons as the daughter by deed or will shall appoint ; and, in default of appointment, for her next of kin. A trust for children, however, is not essential to secure the property as an inalienable provision for the daughter. If it is intended to

Mode of providing for
married daughters.

Trusts for
separate use.

give her all the control which is consistent with this object, the trust should be for her separate and inalienable use during coverture, with remainder to such persons as she by deed or will shall appoint; and, in default, to her next of kin: in which case, of course, the property is effectually devoted to the prescribed trusts during the coverture of the daughter, after the expiration of which (the restraint on anticipation being at an end) she would be able, by an exercise in her own favour of her power of appointment by deed, to acquire the absolute interest, and entitle herself to call for a transfer of the fund. Sometimes the power is confined to appointment by will, with the view of precluding an irrevocable appointment in favour of a husband or any other person.

As to unmarried daughters.

Similar trusts should be created of the shares of unmarried daughters, unless the testator can confide to their prudence the task of making proper settlements for themselves on marriage.

With respect to unmarried daughters, however, it is not in the power of the testator to make a life provision absolutely inalienable, as the legatee, if unmarried at the death of the testator, or at any subsequent period, may, while sole, disregard any restriction on the anticipation of her life interest, though the testator may of course visit such act with the penalty of forfeiture; but this is a strong measure, and not in ordinary cases to be recommended. The trusts adapted to coverture, unless defeated by a positive act on the part of the daughter herself while sole, will take effect when such coverture occurs.

As to giving life interests to husbands of daughters.

A testator may choose to give to the surviving husband of a daughter (whose share after her decease is settled on her children) a life interest in the property, or (which seems better) to empower the daughter herself to limit such an interest; and if this power is made exerciseable by will only, it has the effect of securing to the daughter a degree of influence during her life, as the power cannot be irrevocably exercised.

Powers to trustees to settle shares of daughters marrying during minority.

Sometimes it may be proper to give to trustees a power of settling the shares of children who marry during minority, especially in the case of a daughter who has a reversionary share in a money fund; in such a case it was not, until recently, in the power of either of the marrying parties, even though

the intended husband were adult, to make an absolute settlement, as his marital interest (which, if the fund were an interest in possession, would render the settlement effectual) was subject to the wife's contingent right of survivorship, which her minority prevented her from binding before, and her coverture after, the marriage. But now that, by the 18 & 19 Vict. c. 43,^{18 & 19 Vict. c. 43.} male infants not under 20, and female infants not under 17, can, with the sanction of the Court of Chancery, (to be obtained by petition, without the institution of a suit,) make a valid and binding settlement upon or in contemplation of marriage, there is less necessity for investing trustees with discretionary powers of making settlements of the shares of daughters marrying during minority.

Gifts to a reputed wife or to illegitimate children should be given free from legacy duty; and in providing for the latter persons, care should be taken to dispose of the property, in the event of their death during minority, or without having themselves effectually disposed of the same.

If any of the legatees are debtors to the testator, it should be shown whether the debts are to be brought into account; and if any of them are creditors of the testator, whether the legacies are to go in satisfaction of their claims.

It is often convenient to authorize the payment of legacies which may be small in amount to the parents or guardians of infant legatees, with a direction that the receipts of those persons shall discharge the executors or trustees. And generally the investment of legacies belonging to minors should be authorized, instead of leaving the executors to pay them into Court under 36 Geo. 3, c. 52, s. 32, or the Trustees Relief Acts.

Legacies to charities require especial care.

II. As to the subjects of gift.

Subjects of gift.

It remains to be considered what are the modes of disposition best adapted to various species of property.

Household goods and other perishable articles should, in general, be given to the immediate takers out and out. It is seldom intended that they should be sold; and the creation of life or other partial interests in such property is attended with much inconvenience. Where such partial interests are bequeathed, it should be ascertained whether the temporary pos-

Household goods, &c.

Live stock.

essor is to give any security to the ulterior taker for the preservation of the chattels in question. The creation of a partial interest in live stock is also objectionable, on account of the difficulty of regulating the precise mode of enjoyment, and of adjusting the relative claims of the immediate and ulterior takers. It is better either to give such property absolutely in possession, or, if the testator wishes to create a life interest, to direct the stock to be sold, and the proceeds invested, and the income to be paid to the intended legatee for life, the capital being made divisible at his death.

Trusts for conversion.

Where a general residue of personal estate is given to a person for life, it should be distinctly ascertained and shown whether the legatee is to enjoy the use or income of the property in its actual state, or whether it is to be converted, and the proceeds invested upon government or real securities. This is especially important where any part of the property is of a wasting or deteriorating nature, as annuities or leaseholds of short duration, since property of this description obviously throws into the hands of the immediate taker a larger income than an investment of the proceeds would yield.

On the other hand, if any part of the residue consists of reversionary or other future interests, the case is reversed, and the legatee for life is the person interested in requiring an immediate sale. A want of explicitness as to this point has occasioned much litigation. In general, where the purposes of the will require (as they commonly do) that some part of the residuary property should be sold, the best course is to subject the whole to a trust for sale and conversion, and to give the trustees a discretionary power of continuing the property in its actual state so long as they may deem it expedient so to do, and of paying the income to the persons who would be entitled to the interest of the invested fund. If real estate is included in the trust, it should be expressed that this discretion is not to affect the transmissible quality of the estate, which, under the absolute trust for conversion, would be that of personalty.

As to giving
realty in un-
divided
shares.

Where a testator has real estate which he intends to be enjoyed by members of his family in undivided shares, it is in general advisable that the property should be impressed with a trust for sale and conversion, with a power to the trustees (as above suggested) to suspend indefinitely the execution of the

trust, as a joint ownership is inconvenient, and commonly terminates either in a partition, which is often an expensive and operose measure, (especially if any of the parties interested are under personal incapacity,) or in a sale; and it is to be remembered, that the existence of an absolute trust for sale and conversion does not prevent the parties 'beneficially entitled (all concurring (a)), from electing to retain the property in entirety as land. The plan pursued by some conveyancers of eminence is to give the trustees the legal estate, and then a discretionary power of sale; and this method has been found in practice to work well.

If any of the properties are in mortgage, it should be ascertained whether the devisee is to take it exonerated from the incumbrance; the rule now being, that, in the absence of any evidence of intention to the contrary, the personal estate is not applicable in discharge of the mortgage, but the devisee takes the estate *cum onere*. And here it may be remarked, that an estate in mortgage ought never to be devised to uses in strict settlement, or otherwise subjected to limitations in favour of infants or unborn persons, without being accompanied by a power of sale, or without some other effectual means being provided for raising the money, if called in by the mortgagee. The same remark applies where the testator has charged the estate so devised with the payment of his debts; and it is to be remembered, that the law, without any act of the testator, has now brought this burden (though in a somewhat different mode) on the land; so that if the real estate is likely to be resorted to for this purpose, the proper machinery should be provided for rendering it conveniently available by sale or mortgage. When a testator subjects his real estate to debts, legacies or annuities, it should be ascertained and distinctly indicated, whether he intends to make the land the primary fund, or merely that it should supply any deficiency in the personal estate. The latter would be presumed where the contrary does not appear; but obscurity on the point has been a prolific source of litigation.

Suggestions, where property is subject to incumbrances.

Charge of debts.

(a) And their estates being absolute and indefeasible (*Sisson v. Giles*, 2 N. R. 559, 11 W. R. 971).

Whether the vesting or the enjoyment only is to be postponed.

Another and very important suggestion is, that whenever the enjoyment of the subject of gift (whatever be its nature) is postponed to a period subsequent to the testator's decease, it should be ascertained whether the vesting is also to be deferred; in other words, whether the devisee or legatee is immediately to take such an interest as will pass to his representatives in the event of his dying before the period of enjoyment. Where the vesting is postponed until majority, or any other period, the destination of the income in the meantime should be provided for.

Discretionary powers of trustees.

Where land is devised in favour of infant or unborn persons, ample powers of management should be vested in the trustees, such as that of making repairs (which may often be usefully extended to improvements), letting the property for periods of a convenient duration, and accepting surrenders from, and compounding for claims against, tenants, and, where the estate is considerable, appointing agents and managers (*b*). Indeed, the extent of the discretionary authority of trustees is always a point upon which a testator's intention should be carefully ascertained. The nature of the powers adapted to various circumstances will be collected from the Precedents. Liberality, without excessive indefiniteness, is the desideratum. If special and onerous duties are imposed on trustees, a large discretion should be confided, and, in such cases, a pecuniary allowance for the extraordinary trouble of management may be a prudential measure. This remark particularly applies where executors are directed to carry on a business, as such a duty involves a greater amount of risk and trouble than can be fairly exacted from the gratuitous services of a trustee. Even in ordinary cases, a pecuniary legacy to executors for their trouble seems proper, especially if they are strangers, taking no beneficial interest under the will. And here it may be remarked, that, with a view to the protection of the trustees, and the making provision for the due administration of the affairs, the

Testator's engagements and responsibility as partner or otherwise.

(*b*) A direction by a testator that a certain person should be employed as agent and manager of the testator's estates, whenever his trustees should have occasion for the services of a person in that capacity, was held not to create a trust which such person could enforce (*Finden v. Stephens*, 2 Ph. 142; see also *Shaw v. Lawless*, 5 C. & F. 129).

extent of a testator's engagements to third persons, and especially his rights and responsibilities with respect to any partnership concern, or any joint-stock company, in which he may be engaged, may be a proper subject for inquiry and provision.

III. General suggestions.

General suggestions.
Specific devise.

Where real estates are to be specifically devised, it is well to see the title deeds, or an abstract of the recent title. Misdescription, omission of parcels, mis-statements of tenure, &c., may thus be avoided; and if the lands are described by their situation and occupancy, it should be seen that the two parts of the description are co-extensive.

A marriage or other settlement of the testator should be inspected. Settlement.

If any contract for the purchase or sale of realty be likely to be pending at the testator's death, the destination of the estate or of the purchase-money should be provided for. Contract for purchase or sale.

If the testator is in partnership, it would be well to examine the partnership articles, to see if they contain any power to be exercised by will. Partnership.

Especial care should be taken to provide for the payment of debts and legacies; for the exoneration therefrom of such parts of his property as the testator may wish to exclude; and if the realty be charged therewith, whether in exoneration or only in aid of the personalty, the requisite machinery for working out the charge should be expressly provided. Charge of debts.

Where there is an immediate gift to a class, the components of which may not be in existence at the death of the testator, the destination, in that event, of the intermediate income should be ascertained. Gift to a class.

In all cases where there are limitations to survivors, the period to which the survivorship is to be referred should be most clearly expressed. Survivorship.

Precatory words, or words of recommendation, should be avoided. If it be intended to impose a legal obligation, a definite trust should be created. Precatory words.

Mortgage and trust estates should be expressly devised as a matter of course. Mortgage and trust estates.

General powers vested in the testator over the beneficial interest in realty and personalty will be exercised by a general Powers.

disposition, unless a contrary intention appear. It should be borne in mind, however, that as to powers, whether general or special, testators may wish the property to go as in default of appointment; and this wish may (especially as regards powers of revocation) be defeated by an unguarded general disposition.

Annuities. If annuities be given it should be shown how they are to be raised; whether by the purchase by the executors of a government or other annuity, or by the appropriation of a particular fund, or as a charge on a particular estate.

Legacy duty. Annuities, rent-charges and life interests should be given clear of legacy duty. A saving is effected by giving all legacies clear of duty.

Lapse. Provision should be made for lapse; and, in the case of contingent gifts, for the non-occurrence of the contingency.

Acknowledgment by married woman. When the legal estate in land is given to a female, the necessity for an acknowledgment, in case she should deal with the land during coverture, may be avoided by giving her also a power of appointment.

Copyholds. In disposing of copyholds (whether vested in the testator as beneficiary, mortgagee or trustee) a power of appointment should invariably be given, either to trustees or the beneficial owner, or both.

Trustees' powers. Powers to trustees of investment, to vary securities, to apply the income of shares of minors for their maintenance, and to apply a definite portion of the principal for their advancement, should be inserted as a matter of course. The common power to give discharges may now be omitted; but a power to appoint new trustees may or may not be necessary. The common indemnity clauses to trustees are not now of much importance.

Trustees' discretions. And, in cases to which such provisions are applicable, trustees should have a discretion given them as to the appointment of agents, bailiffs, &c.; insuring, repairing and leasing property; cutting timber; working mines; and generally in reference to the management of the property. On all these points, the wishes of the testator should be ascertained.

It may be necessary to negative wholly or partially the operation of all or some of the recent Acts known as *Lord St. Leonards' Act*, *Lord Cranworth's Act*, *Mr. Locke King's Act*, and the *Leases and Sales of Settled Estates Act*.

We may conclude with the remark, that no person should attempt to prepare a codicil which is intended to revoke, alter or modify any disposition in the will, or in a previous codicil, without seeing such prior testamentary document, the contents of which are often very imperfectly recollected and stated by the testator; and no reader of legal reports need be informed how numerous and perplexing are the questions to which inaccuracies occasioned by a neglect of this precaution have given rise.

As to preparing codicils.

APPENDIX.

I.

The following enactments are not repealed by the Wills Act,
1 Vict. c. 26.

TESTAMENTARY GUARDIANS: The 12 Car. 2, c. 24, s. 8 (see *ante*, p. 227), enacts, "That where any person hath or shall have any child or children under the age of twenty-one years, and not married at the time of his death, that it shall and may be lawful to and for the father of such child or children, whether born at the time of the decease of the father, or at that time in *ventre sa mère* [*or whether such father be within the age of twenty-one years, or of full age*], by his deed executed in his lifetime, or by his last will and testament in writing, in the presence of two or more credible witnesses, in such manner and from time to time as he shall respectively think fit, to dispose of the custody and tuition of such child or children for and during such time as he or they shall respectively remain under the age of twenty-one years or any lesser time, to any person or persons in possession or remainder, other than popish recusants; and that such disposition of the custody of such child or children made since the 24th of February, 1645, or hereafter [*i. e.* after 1660] to be made, shall be good and effectual against all and every person or persons claiming the custody or tuition of such child or children as guardian in socage or otherwise: And that such person or persons, to whom the custody of such child or children hath been or shall be so disposed or devised as aforesaid, shall and may maintain an action of ravishment of ward or trespass, against any person or persons which shall wrongfully take away or detain such child or children, for the recovery of such child or children; and shall and may recover damages for the same in the said action, for the use and benefit of such child or children."

12 Car. 2,
c. 24.
Fathers may
dispose of
custody of
infants by
deed or will.

Actions of
ravishment
of wards.

The 9th section enacts, "That such person or persons, to whom the custody of such child or children hath been or shall be so disposed or devised, shall and may take into his or their custody, to the use of such child or children, the profits of all lands, tenements and hereditaments of such child or children; and also the custody, tuition

Management
of lands and
personal
estate of in-
fants by their
guardians.

12 Car. 2,
c. 24.

and management of the goods, chattels and personal estate of such child or children, till their respective age of twenty-one years, or any lesser time, according to such disposition aforesaid; and may bring such action or actions in relation thereunto, as by law a guardian in common socage might do."

But section 10 provides, "That this Act, or anything therein contained, shall not extend to alter or prejudice the custom of the City of London, nor of any other city or town corporate, or of the town of Berwick-upon-Tweed, concerning orphans; nor to discharge any apprentice from his apprenticeship."

These enactments remain in force, except as to the italicised passage in brackets in sect. 8.

WILLS OF PETTY OFFICERS, SEAMEN AND MARINES: By the 12th section of the Wills Act (*ante*, p. 27) the provisions of 11 Geo. 4 & 1 Will. 4, c. 20, with respect to wills of petty officers and seamen in the navy and marines, were preserved. But those provisions have since been repealed, and the following Act has been passed:—

28 & 29 VICT. c. 72.

An Act to make better Provision respecting Wills of Seamen and Marines of the Royal Navy and Marines. [29th June, 1865.]

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows:

Short title.

1. This Act may be cited as The Navy and Marines (Wills) Act, 1865.

Interpreta-
tion of
terms.

2. In this Act—

The term "the Admiralty" means the Lord High Admiral of the United Kingdom, or the Commissioners for executing the Office of Lord High Admiral:

The term "seaman or marine" means a petty officer or seaman, non-commissioned officer of marines or marine, or other person forming part in any capacity of the complement of any of her Majesty's vessels, or otherwise belonging to her Majesty's naval or marine force, exclusive of commissioned, warrant, and subordinate officers, and assistant engineers, and of kroomen.

Will made
before entry
ineffectual as
to wages, &c.

3. A will made after the commencement of this Act by any person at any time previously to his entering into service as a seaman or marine shall not be valid to pass any wages, prize money, bounty money, grant, or other allowance in the nature thereof, or other money payable by the Admiralty, or any effects or money in charge of the Admiralty.

4. A will made after the commencement of this Act by any person while serving as a seaman or marine shall not be valid for any purpose if it is written or contained on or in the same paper, parchment, or instrument with a power of attorney.

28 & 29 Vict.
c. 72.
Will invalid
if combined
with power of
attorney.

5. A will made after the commencement of this Act by any person while serving as a seaman or marine, or when he has ceased so to serve, shall not be valid to pass any wages, prize money, bounty money, grant, or other allowance in the nature thereof, or other money payable by the Admiralty, or any effects or money in charge of the Admiralty, unless it is made in conformity with the following provisions :—

Regulations
for Wills of
Seamen, &c.
as to wages,
&c.

- (1.) Every such will shall be in writing and be executed with the formalities required by the law of England in the case of persons not being soldiers in actual military service or mariners or seamen at sea :
- (2.) Where the will is made on board one of her Majesty's ships, one of the two requisite attesting witnesses shall be a commissioned officer, chaplain, or warrant or subordinate officer belonging to her Majesty's naval or marine or military force :
- (3.) Where the will is made elsewhere than on board one of her Majesty's ships, one of the two requisite attesting witnesses shall be such a commissioned officer or chaplain or warrant or subordinate officer as aforesaid, or the governor, agent, physician, surgeon, assistant surgeon, or chaplain of a naval hospital at home or abroad, or a justice of the peace, or the incumbent, curate, or minister of a church or place of worship in the parish where the will is executed, or a British consular officer, or an officer of customs, or a notary public :

A will made in conformity with the foregoing provisions shall, as regards such wages, money, or effects, be deemed to be well made for the purpose of being admitted to probate in England ; and the person taking out representation to the testator under such will shall exclusively be deemed the testator's representative with respect to such wages, money, or effects.

6. Notwithstanding anything in this or any other Act, a will made after the commencement of this Act by a seaman or marine while he is a prisoner of war shall (as far as regards the form thereof) be valid for all purposes if it is made in conformity with the following provisions :—

As to wills
made by
prisoners of
war.

- (1.) If it is in writing and is signed by him, and his signature thereto is made or acknowledged by him in the presence of and is in his presence attested by one witness, being either

28 & 29 Vict.
c. 72.

a commissioned officer or chaplain belonging to her Majesty's naval or marine or military force, or a warrant or subordinate officer of her Majesty's navy, or the agent of a naval hospital, or a notary public:

- (2.) If the will is made according to the forms required by the law of the place where it is made:
- (3.) If the will is in writing and executed with the formalities required by the law of England in the case of persons not being soldiers in actual military service or mariners or seamen at sea.

Payment
under will
not in con-
formity with
Act.

7. Notwithstanding anything in this Act, in case of a will made after the commencement of this Act by any person while serving as a marine or seaman, and being either in actual military service or a mariner or seaman at sea, the Admiralty may pay or deliver any wages, prize money, bounty money, grant or other allowance in the nature thereof, or other money payable by the Admiralty or any effects or money in charge of the Admiralty, to any person claiming to be entitled thereto under such will, though not made in conformity with the provisions of this Act, if, having regard to the special circumstances of the death of the testator, the Admiralty are of opinion that compliance with the requirements of this Act may be properly dispensed with.

Commence-
ment of Act.

8. This Act shall commence on such day, not later than the 1st day of January, 1866, as her Majesty in Council thinks fit to direct; nevertheless her Majesty in Council may, if it seems fit, with reference to any places out of the United Kingdom, direct that this Act do not commence there, respectively, until a time after that day, and with respect to every such place the time so appointed shall be deemed the time of the commencement of this Act.

Publication
of Orders in
Council.

9. Every Order in Council under this Act shall be published in the London Gazette, and shall be laid before both houses of parliament within thirty days after the making thereof, if parliament is then sitting, and if not, then within thirty days after the next meeting of parliament.

II.

ON DOMICILE.

THE law of personalty (moveables) follows the law of the owner's domicile (*mobilia sequuntur personam*). The law of realty (immoveables) is that of the country in which the realty is situated (*lex loci rei sitæ*). A will disposing of real estate must therefore be executed with the forms required by the law of the country in which such estate is situated. (As to leaseholds for years, see *post*, p. 545).

Personalty governed by *lex domicilii*.
Realty by *lex loci rei sitæ*.

By the Roman law a man might be without a domicile (see J. G. Phil. Prin. Jurisp. 164); but the English law considers every person as domiciled somewhere or other.

Domicile is of three kinds; 1. Of birth or origin; 2. By operation of law; 3. Of choice (R. Phil. Dom. 13; see also Sto. Conf. Laws, ch. 3; Westlake, Intern. Law, ch. 3).

Domicile, of three kinds.

"Domicile" answers very much to the common meaning of our word "home," and where a person possesses two residences, the phrase "he made the latter his home," would point out the latter to be his domicile (Phil. Dom. 13).

1. Domicile of birth or origin—

The domicile of origin is that arising from a man's birth and connexions.

Domicile of origin.

If a child is born whilst its parents are on a journey, or temporarily absent from home, the parent's domicile, and not the accidental place of birth, is the domicile of the child (*ib.* 25).

2. Domicile by operation of law—

This head comprises those who are under the control, and to whom the law gives the domicile, of another, and those on whom the state fixes a domicile. For example—The wife's domicile is that of her husband (Phil. Dom. 27—36; Westlake, Intern. Law, 42; *Dalhousie v. M'Douall*, 7 C. & F. 817; *Bremer v. Freeman*, D. & Sw. 192, 10 Moo. P. C. 306, 5 W. R. 618; *Gout v. Zimmermann*, 5 No. Cas. 440; *Yelverton v. Yelverton*, 1 Sw. & Tr. 574, 6 Jur. N. S. 24, 8 W. R. 134), and this is the case, even though they be living apart (*Warrender v. Warrender*, 2 C. & F. 488; *Whitcombe v. Whitcombe*, 2 Cur. 351; *Re Daly's Settlement*, 25 Be. 456). After the death of her husband, the widow retains his domicile so long as she remains a

Domicile by operation of law.
Wife.

DOMICILE.	<p>widow (<i>Gout v. Zimmermann, ubi sup.</i>). A divorced woman (<i>Williams v. Dornier</i>, 2 Rob. 505), and also, it is conceived, one judicially separated from her husband (since by 20 & 21 Vict. c. 85, sec. 7, a judicial separation has "the same force and the same consequences as a divorce <i>a mensâ et thoro</i>;" but see <i>Dolphin v. Robins</i>, 7 H. L. C. 390), has the option of taking a new domicile, but until she exercises this option, her marital domicile is not changed (see <i>Warrender v. Warrender, ubi sup.</i>).</p>
Lunatic husband.	<p>But it would seem that if the husband be a lunatic, and the wife be appointed his guardian, she may choose her own, and change her husband's domicile.</p>
Wife of convict.	<p>And if the husband be transported for life, and thereby his domicile be changed, it would probably be held that the wife is at liberty to select her own domicile.</p>
Minor.	<p>The domicile of a legitimate unemancipated minor is that of the father, or of the mother during widowhood, or (though this is disputed) of the guardian (Phil. Dom. 37—54 ; Westlake, Intern. Law, 35). Of his own accord a minor cannot change his domicile (<i>Somerville v. Somerville</i>, 5 Ves. 787) ; but if the mother acquire a new domicile (as by a second marriage), it is communicated to an infant residing with her (<i>Pottinger v. Wightman</i>, 3 Mer. 67 ; <i>Johnstone v. Beattie</i>, 10 C. & F. 138) ; and the better opinion appears to be that the guardian also has the power of changing the domicile of his ward, provided it be done <i>sine malâ fide</i> (see 3 Mer. 80 ; Westlake, Intern. Law, 35 ; see also <i>Stuart v. Moore</i>, 4 Macq. 1, 9 W. R. 722 ; <i>Stuart v. Marquis of Bute</i>, 9 H. L. C. 440). A legacy bequeathed to an infant domiciled abroad may be paid when the infant comes of age by the law of England or of the place of domicile, whichever first happens ; and in the meantime must be dealt with in the usual way as an infant's legacy, although by the law of the place of domicile the guardian of the infant is entitled to receive the legacy (<i>Re Hellmann's Will</i>, L. R., 2 Eq. 363).</p>
Emancipation of minor.	<p>Marriage emancipates a minor, and gives him the power of choosing a new domicile ; so by accepting an office from which he is not removeable, or by entering into a house of commerce with the consent of those under whose control he is, a minor becomes emancipated, and capable of acquiring a domicile of his own. But, for a complete and perfect emancipation, the relation contracted by the minor must be one which wholly and permanently excludes the parental control (<i>Rex v. Wilmington</i>, 5 B. & Al. 525). A soldier or marine is emancipated (<i>Rex v. Walpole St. Peter's</i>, cited in <i>Rex v. Woburn</i>, 8 T. R. 479 ; <i>Rex v. Rotherfield Greys</i>, 1 B. & C. 345), by his entry into the service of the crown ; but in such a case the parental authority is</p>

suspended only, not destroyed, and if the service of the crown should cease before the age of twenty-one is attained, the parental control revives (*ib.*) But voluntary entrance into a local militia (*Reg. v. Scammonden*, 8 Q. B. 349), or a police force (*Reg. v. Selborne*, 8 W. R. 21), or the service of the captain of a merchant ship (*Rex v. Lytchet Matraverse*, 7 B. & C. 226), does not emancipate a minor.

DOMICILE.

The domicile of a posthumous, or of an illegitimate minor, is that of the mother; if the parents are unknown, it is the place of birth or discovery of the child (Westlake, Intern. Law, 35).

Posthumous,
illegitimate,
or of un-
known
parents.
Student.

One who sojourns in a particular place for the purpose of prosecuting his studies does not acquire a domicile in that place (Phil. Dom. 54).

It would seem that the domicile of the guardian or committee of a lunatic determines the domicile of the lunatic (*ib.* 54—57; but see *contrà*, Westlake, 47). As to the effect of a change of the father's domicile upon the question of domicile of a lunatic son, see *Sharpe v. Crispin* (Prob. Court, 9 Feb., 1869), in which case the son was of unsound mind throughout the whole of his majority.

Lunatic.

As a general rule, a domestic servant preserves the domicile which he possessed before entering into service (see, however, Westlake, 42); but this is a question depending upon the particular circumstances of each case (Phil. 57—60); and *a fortiori* in any other kind of service the circumstances must be taken into account as criteria of the *animus manendi*.

Servant.

The holder of an office of a temporary and revocable nature does not change his original domicile (*Attorney-General v. Rowe*, 1 H. & C. 31, 10 W. R. 718); but if the office be not revocable, and its duties necessitate residence in a particular place, then the holder of such office acquires a domicile at that place (Phil. 61—79). The residence required must, however, be constant, and not occasional merely (*Somerville v. Somerville*, 5 Ves. 750).

Public
officer.

Thus the civil and military officers of the late E. I. C. acquired an Indian domicile (*Munroe v. Douglas*, 5 Mad. 404; *Bruce v. Bruce*, 6 Br. P. 566, 2 B. & P. 229, n.; *Cragie v. Lewin*, 3 Cur. 435; *Hepburn v. Skirving*, 9 W. R. 764); but the domicile of an officer in the general service of the crown is unchanged by his serving in foreign parts (Phil. 78, 79; *Attorney-General v. Pottinger*, 6 H. & N. 733, 9 W. R. 578). And in the case of an officer, in the service either of the crown or of the E. I. C., absent on furlough, and many years resident abroad, the presumption of law is against the acquisition of a foreign domicile (*Hodgson v. De Beauchesne*, 12 Moo. P. C. 285, 7 W. R. 397, 33 L. T. 36). But the presumption, raised by the continuing on half-pay in the navy, against a change of domicile, may be rebutted (*Cockrell v. Cockrell*, 25 L. J., Ch. 730, 4 W. R. 730).

Military or
naval officer.

- DOMICILE.** — Persons who enter the military service of a foreign state acquire a domicile in that state (*Ommaney v. Bingham*, before H. of L., 18 March, 1796; see 5 Ves. 757); but (as between the different countries which together constitute the United Kingdom) it seems that subjects of the Queen do not, by entering the service of the crown, acquire an English domicile, but retain their domicile of origin. Thus, a domiciled Irishman by entering the Royal Artillery (*Yelverton v. Yelverton*, 1 Sw. & Tr. 574, 8 W. R. 134), and a Jerseyman by entering the Royal Navy (*Re Patten*, 6 Jur., N. S. 151), did not acquire a domicile in England.
- Ambassador.** An ambassador preserves the domicile of the country which he represents and to which he belongs, and this privilege extends to those resident with him (Phil. 79—86). But a person who has acquired a foreign domicile does not revive his domicile of origin by accepting an appointment as ambassador from his native country to that in which he has acquired his domicile (*Heath v. Samson*, 14 Be. 441). So also a Portuguese, who had acquired an English domicile, did not lose it by becoming *chargé d'affaires* in this country for the Portuguese sovereign (*Attorney-General v. Kent*, 1 H. & C. 12, 10 W. R. 722).
- Consul.** Consuls, also, when sent out from one country to represent it in another, retain the domicile of the country which they serve (Westlake, Intern. Law, 44; see, however, Sto. Conf. Laws, 60). But if a government choose to employ as consul a person already resident in the foreign country, his domicile is not changed by the appointment. (As to consuls, see *Maltass v. Maltass*, 1 Rob. 79; *Gout v. Zimmermann*, 5 No. Cas. 445.)
- Ecclesiastic.** The domicile of a beneficed ecclesiastic is the place where his benefice is situated (Phil. 86).
- Prisoner.** A prisoner preserves the domicile of his country (Phil. 87; Westlake, 47; *Burton v. Fisher*, 1 Milw. 183). A person transported for life loses his original domicile (Phil. 88—90).
- Exile.**
- Fugitive.** A fugitive from his country, on account of civil war, retains his domicile in his native land (Phil. 90—97). And, generally, a domicile will not be lost by constrained residence in a foreign country (*Re Duchesse d'Orléans*, 1 Sw. & Tr. 253, 5 Jur., N. S. 104). But of course a prisoner, exile, fugitive or emigrant may, by continuing to reside in a country after his power of choice is restored to him, like the minor who resides in a place after his minority has ceased, acquire a domicile therein: see, as to the refugee, *Collier v. Rivaz* (2 Cur. 858); and as to the acquisition of a domicile during exile, by forming an attachment to the place of exile, *Heath v. Samson* (14 Be. 441).

3. Domicile of choice—

It may be taken as a general maxim of European and American law that every person *sui juris* is at liberty to choose his domicile, and to change it according to his inclination (Phil. Dom. 98); but as in the *Digest* it is laid down, that "*Domicilium re et facto transfertur, non nudâ contestatione*," that facts and actions are required to prove a change of domicile (see J. G. Phil. Princ. Jurisp. 162), so it is a principle of English law that the domicile of origin must prevail, until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicile and taking another as his sole domicile (*Somerville v. Somerville*, 5 Ves. 786; *Dalhousie v. McDouall*, 7 C. & F. 817; *Munro v. Munro*, *ib.* 842; *Lord v. Colvin*, 4 Drew. 366; *De Bonneval v. De Bonneval*, 1 Cur. 857; *Hodgson v. De Beauchesne*, 12 Moo. P. C. 285, 7 W. R. 397; *Crookenden v. Fuller*, 1 Sw. & Tr. 441, 8 W. R. 49, 5 Jur., N. S. 1222); and to acquire a domicile there must be actual residence in the place chosen, which must be the principal and permanent residence (*Dalhousie v. McDouall*, *ubi sup.*). The domicile of origin adheres until a new domicile is acquired, and the onus of proving a change of domicile is on the party who alleges it (*Bell v. Kennedy*, L. R., 1 Sc. App. 307; *Attorney-General v. Countess Blucher de Wahlstatt*, 3 H. & C. 374).

An acquired domicile was defined by *Kindersley, V.-C.*, in *Lord v. Colvin* (4 Drew. 376), as follows:—"That place is properly the domicile of a person in which he has voluntarily fixed the habitation of himself and his family, not for a mere special and temporary purpose, but with a present intention of making it his permanent home, unless and until something (which is unexpected, or the happening of which is uncertain) shall occur to induce him to adopt some other permanent home." But when the same case (nom. *Moorhouse v. Lord*, 10 H. L. C. 272, 1 N. R. 555, 11 W. R. 637,) came before the House of Lords, the Vice-Chancellor's definition was rejected as being too extensive; it would reach the case of a person of delicate health going to a milder climate with the determination of remaining there until his health was restored; and it omitted one important element, viz., the fixed intent of abandoning one domicile and permanently acquiring another. The change of residence must be accomplished *animo et facto*; and to acquire a new domicile the *animus* must go to this, that a man must intend *quatenus in illo exuere patriam*, he must intend to abandon his citizenship of origin and to become a Frenchman instead of an Englishman (*Moorhouse v. Lord*, *ubi sup.*).

Where a person resides in a foreign country for the benefit of his health, such residence is not necessarily to be considered a compul-

DOMICILE.

Of choice.

Acquired domicile.

Definition.

Residence on account of health.

DOMICILE.

sory residence, and a foreign domicile may be acquired (*Hoskins v. Matthews*, 8 D. M. & G. 13, 28). See also *Attorney-General v. Fitzgerald* (3 Drew. 610).

Evidence as to domicile.

The question of domicile is one of law and fact (J. G. Phil., Prin. Jurisp. 166), but more of fact than of law (3 Ves. 201); the proof of intention is the turning-point in questions of this nature (J. G. Phil. 167). All the acts of the deceased are taken into consideration as evidence with respect to his domicile. Oral declarations appear to be but slightly esteemed, but to statements in letters, great weight was given in the balance of evidence in *Munro v. Munro* (*ubi sup.*);—the locality of a mansion-house kept up by the person whose domicile is in dispute, the place at which his wife and children have resided, the depositaries of his heirlooms, or valuable chattels, or his papers and muniments, his description in legal documents, his possession and exercise of political rights and payment of taxes, the length of time during which he has resided in any one place, have all more or less weight in a case of disputed domicile (Phil. Dom. ch. 9; see also 1 Jarm. Wills, ch. 1; Deane, Wills, 27, *et seq.*; *Lord v. Colvin*, 4 Drew. 366; *Anderson v. Laneville*, 9 Moo. P. C. 325, 2 Sw. & Tr. 24, 9 W. R. 74).

Stronger evidence is necessary to show an abandonment of an original for a foreign domicile than to show retention of original domicile (*Lord v. Colvin*, *Moorhouse v. Lord*, *ubi sup.*); and the domicile of origin, after it has been abandoned, revives more easily than an acquired domicile (*Hoskins v. Matthews*, 4 W. R. 216; *Attorney-General v. Pottinger*, 6 H. & N. 733, 9 W. R. 578).

Until an acquired domicile is finally abandoned, the domicile of origin does not revive (*Craigie v. Lewin*, 3 Cur. 435; *Gout v. Zimmermann*, 5 No. Cas. 440; *Maxwell v. Maclure*, 36 L. T. 65; *Re Bianchi*, 3 Sw. & Tr. 16, 11 W. R. 240; *Re Raffanel*, 3 Sw. & Tr. 49, 11 W. R. 549). In *Drevon v. Drevon* (4 N. R. 316), V.-C. Kindersley is reported to have said that the domicile of origin could not be resumed without an actual return to the country which was the original domicile; *sed qu.*, if the acquired domicile was actually abandoned, and the death took place *in itinere*?

Will of personality, *lex domicilii*.

By the *jus gentium*, the law of the testator's domicile at the time of making his will and of his death (if there is no intermediate change), must govern the form of the will of personality and the solemnities of its execution (*Bremer v. Freeman*, 10 Moo. P. C. 306, D. & Sw. 192, 5 W. R. 618; *De Bonneval v. De Bonneval*, 1 Cur. 856; *Dolphin v. Robins*, 7 H. L. C. 390, 1 Sw. & Tr. 37, 7 W. R. 674; *Re Daly's Settlement*, 25 Be. 456). But until recently,

where the law of the domicile at the date of the will differed from the law of the domicile at the testator's death, the latter law prevailed (*Bremer v. Freeman*, *ubi sup.*; *Whicker v. Hume*, 7 H. L. C. 124), except in the case of a will made in execution of a power, which was and is valid, if made and executed in accordance either with the law of the testatrix's domicile at the date of the will, notwithstanding a subsequent change of domicile (*Tatnall v. Hankey*, 2 Moo. P. C. 342; *Re Alexander*, 1 Sw. & Tr. 454, n., 29 L. J., Prob. 93; 1 Jarm. Wills, 5; see however *Re Hallyburton*, L. R., 1 Prob. 90), or with the law of her domicile at the time of her death (*D'Huart v. Harkness*, 34 Be. 324). And see now, 24 & 25 Vict. c. 114, stated *post*, p. 538, as to the wills of British subjects dying after the 6th August, 1861.

A domiciled Englishman, resident in Milan, signed (in 1838) a codicil disposing of personalty in the United States of America. This codicil, which was holograph and signed, but unattested, was well executed according to the Austrian law. It was held by the Privy Council: 1. That the validity of the codicil was to be governed by the law of the domicile; and 2. That the provisions of 1 Vict. c. 26 applied to testamentary papers made in foreign countries by a person having an English domicile (*Croker v. Marquis of Hertford*, 4 Moo. P. C. 339, 8 Jur. 863). And in *Bremer v. Freeman* (10 Moo. P. C. 306) it was also decided that the Wills Act applies only to persons who have an English domicile; but see now, 24 & 25 Vict. c. 114, *post*.

The person impeaching a will must show that the will ought not to be admitted to proof. But if that person can show that the testator had lost his English domicile, gained another, and died in that new domicile, the *onus* of proof, that the will was well executed pursuant to the law of that domicile, is shifted, and the party propounding the will must prove that it was executed in accordance with the law of the acquired domicile (*Bremer v. Freeman*, *ubi sup.*; see also *Smith v. Gould*, 4 Moo. P. C. 21, 8 Jur. 543). If reliance is placed upon a difference between English and foreign law, the party relying on such difference is bound to prove it by witnesses or authorities (*Smith v. Gould*, *ubi sup.*; see also *Crookenden v. Fuller*, 1 Sw. & Tr. 441, 8 W. R. 49, 5 Jur., N. S. 1222). And where a declaration propounding a will depends on the due execution according to the law of the testator's domicile, it must contain a distinct averment that it was duly executed according to that law; an averment that the will was admitted to probate by a competent Court of the alleged domicile is insufficient (*Isherwood v. Cheetham*, 2 Sw. & Tr. 607, 31 L. J., Prob. 99).

The grant of probate is conclusive as to the due execution (*Whicker v. Hume*, 7 H. L. C. 124) and the validity of the instrument as a will

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Onus of proof
of due execu-
tion.Probate, how
far con-
clusive.

DOMICILE. of personalty, but not as to the validity of its contents. Therefore to a bill filed by a legatee against an executor who has taken out probate in this country, it is a valid plea that the testator was domiciled in a foreign country, and that by the laws of that country the dispositions of the will are void (*Campbell v. Beaufoy*, Joh. 320).

The English Court of Probate follows the grant of the Court of the testator's domicile as to the document which that Court has admitted to probate, but not as to the person to whom the grant is made (*Re Cosnahan*, L. R., 1 Prob. 183).

The Judicial Committee of the Privy Council, on a review of the French decisions, and the opinions of text writers, held that the will well executed in the English form of an Englishman domiciled in France, but having no authorisation from the Emperor (Cod. Nap. Art. 13), is invalid, if it be not also conformable to the French law (*Bremer v. Freeman*, 10 Moo. P. C. 306). In consequence of the decision in this case, a bill, affecting the wills of British subjects residing in foreign parts, was introduced into the House of Commons in 1858, by Sir Fitzroy Kelly, whilst Attorney-General; but the bill, though it passed the Lower House, did not become law.

24 & 25 Vict.
c. 114.

But in the session of 1861 two Acts were passed to amend the law with respect to wills of personalty as affected by the domicile of the testators. By the first of these acts, 24 & 25 Vict. c. 114, it is enacted (sect. 1) that every will made out of the United Kingdom by a British subject, whatever may be his domicile at the time of making the same or at his death, shall as regards personalty be held to be well executed for the purpose of being admitted to probate, if the same be made according to the forms required either by the law of the place where the same was made, or by the law of the place where the testator was domiciled when the same was made, or by the law then in force in that part of her Majesty's dominions where the testator had his domicile of origin. Every will made within the United Kingdom (sect. 2) by a British subject, whatever his domicile at the time of making the same or at his death, shall as regards personalty be held to be well executed and admitted to probate or confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made. No will shall be held to be revoked (sect. 3) or to have become invalid, nor the construction thereof be altered, by reason of any subsequent change of domicile of the testator. Nothing in the Act contained shall (sect. 4) invalidate any will, as regards personalty, which would have been valid if the Act had not passed, except as such will may be revoked or altered by any subsequent will made valid by the Act. The Act

extends (sect. 5) only to wills made by persons dying after the 6th August, 1861.

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24 & 25 Vict.
c. 114.

When a British subject dies abroad after the passing of this Act, leaving a will executed in England in accordance with the law of England, upon motion for probate it is not necessary to file affidavits showing that he had not acquired a foreign domicile (*Re Rippon*, 3 Sw. & Tr. 177, 32 L. J., Prob. 141).

The operation of this Act may be illustrated by the following examples:—

Operation of
the Act.

1. A testator whose original domicile is English, and who, at the date of his will, is domiciled in England, makes his will in France; so far as regards personalty, that will will be valid if made according to the forms required by the law either of England or of France.

2. A testator whose original domicile was English, and who, at the date of his will, is domiciled in France, makes his will in England; so far as regards personalty (and so far as the English Courts are concerned), that will will be valid if made according to the forms required by the law of England (by sect. 2) or of France (by sect. 4).

3. A testator whose original domicile was English, and who, at the date of his will, is domiciled in France, makes his will in Prussia; so far as regards personalty (and so far as the English Courts are concerned) that will will be valid if made according to the forms required by the law of England, or of France, or of Prussia.

4. And, in none of the above instances, will the will be invalidated by a change of domicile subsequent to the date of the will.

5. This Act leaves untouched the law of devolution of personalty in cases of intestacy as depending upon the law of domicile.

6. Neither does the Act provide for every case of testacy. Suppose, *e. g.*, a British subject resident (but not domiciled) in Portugal, whose original domicile was English, and whose acquired domicile is French, makes his will in Spain, according to the forms required by the law of Portugal (but not according to the forms required by the law either of England, France or Spain). The will would be invalid. *Qu.* Would it be rendered valid by the subsequent acquisition of a Portuguese domicile?

Many of the cases on domicile have arisen in regard to the wills of Scotchmen domiciled, or supposed to be domiciled, in England; and of Englishmen domiciled, or supposed to be domiciled, in Scotland. The 2nd sect. of the Act will operate beneficially in admitting such wills to probate (in England or Ireland) or confirmation (in Scotland) if executed with the forms required by the law of that part of the United Kingdom where the execution takes place, quite irrespective of whether the testator's domicile be English or Scotch. A domiciled Scotchman made a will, afterwards married in Scotland,

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and subsequently acquired an English domicile which he retained until his death; it was held, under sect. 3, that as the will was valid so long as he remained in Scotland, it was not revoked by the subsequent change of domicile (*Re Reid*, L. R., 1 Prob. 74).

24 & 25 Vict.
c. 121.

The 24 & 25 Vict. c. 121, enacts (sect. 1) that whenever her Majesty shall, by convention with any foreign state, agree that provisions to the effect of the enactments therein contained shall be applicable to the subjects of her Majesty and of such foreign state respectively, it shall be lawful for her Majesty, by Order in Council, to direct that after the publication of such Order no British subject, resident at the time of his death in the foreign country named in such Order, shall be deemed under any circumstances to have acquired a domicile in such country, unless such British subject shall have been resident in such country for one year immediately preceding his decease, and shall also have made and deposited in a public office (to be named in the Order in Council) a declaration in writing of his intention to become domiciled in such foreign country; and every British subject dying resident in such foreign country, but without having so resided and made such declaration, shall be deemed for all purposes of testate or intestate succession as to moveables to retain the domicile he possessed at the time of going to reside in such foreign country. The Act shall not apply (sect. 3) to foreigners who may have obtained letters of naturalization in any part of her Majesty's dominions. The 2nd and 4th sections provide for the case of subjects of foreign states dying in her Majesty's dominions.

The object of both these Acts (it may be presumed) was to prevent the frequent and expensive litigation which arose from the existence of uncertainty as to the domicile of testators, and, in consequence, as to the validity of their testamentary dispositions. The first-mentioned Act seeks to accomplish this object by relieving British subjects (for testamentary purposes, and so far as British legislation is competent to do so) from the consequences of a foreign domicile, and by relaxing the stringency of the rule which necessarily required a compliance with the formalities of execution prescribed by the laws of the place of domicile; the efficacy of such a compliance is not destroyed, but the observance of other formalities is rendered equally valid, whatever the actual domicile may be; and thus, in most, if not in all cases, litigation to determine the domicile is rendered unnecessary. The secondly-mentioned Act seeks to attain the same end in a different manner, by a strict definition of the acts which, and which alone, will constitute for testamentary purposes an abandonment of the domicile possessed by the testator at the time of going to reside in the foreign country in which his death takes place.

It is only with the concurrence of each foreign state that this Act can be made applicable to British subjects and the subjects of that foreign state; at present (so far as the editor is aware) no convention with any foreign power has been agreed to by her Majesty, and consequently the Act is inoperative.

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Operation of
24 & 25 Vict.
c. 121.

When it comes into operation by means of a convention with any particular State, this Act will extend to cases of intestacy, as well as of testacy, of British subjects, occurring within that state.

It would seem also that so long as the operation of this Act is limited to certain foreign states, and is not applicable to others, the question of domicile might not unfrequently (so far as this Act is concerned) have to be litigated as heretofore. Suppose that a convention has been made with France but not with Portugal, and that a British subject whose domicile of origin was English, but who has resided in Portugal under circumstances sufficient to afford ground for maintaining that a Portuguese domicile has been acquired, subsequently removes to France, there makes his will, and resides till his death, but without having made the declaration required by c. 121; all that the Act declares is, that the testator shall be deemed to retain the domicile which he possessed at the time of going to reside in France; thus leaving the question as to whether such domicile was English or Portuguese entirely untouched. It is submitted, however, that to this case c. 114 would come in aid; and that (in the Courts of this kingdom) the will would be held to be well executed if made in accordance with the forms required either by the law of France (the place where the will was made) or by the law of England (where the testator had his domicile of origin).

Both the statutes under consideration received the royal assent on the 6th August, 1861; but neither contains any reference to the other. Lord St. Leonards is of opinion, that when a domicile has been acquired in any particular foreign state with which a convention may hereafter be made, c. 121 will supersede c. 114 as regards such state, leaving the latter Act to operate as to states with which there is no convention (see the policy of the Acts discussed, R. P. Stat. pp. 397—409). Suppose that a convention has been made with France, and that a British subject originally domiciled in England becomes resident in France; if he has not complied with the formalities which alone, according to the convention, constitute an abandonment of his English domicile, he is to be deemed, for all purposes of succession as to moveables, to have retained that domicile; if he die intestate, or if his will has been executed in accordance with English law, no question arises; but suppose he has executed a will in France, well executed according to the law of France, but

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cc. 114, 121.

not well executed according to the law of England, there seems no reason for excluding this testator from the benefit of the 1st section of c. 114, and in this case the two Acts may very well operate concurrently and without clashing.

But, further, it is enacted that without compliance with certain formalities the English domicile shall be deemed to be retained; it is not enacted that compliance with those formalities shall amount to the acquisition of a French domicile. Notwithstanding compliance with those formalities, the French Courts might hold that the testator was not domiciled in France, or in other words that the English domicile was retained; and in this case also it is submitted that the testator would be entitled to the benefit of c. 114, and that the Courts of this country would uphold his will, as being made according to the forms required by the law of the place where the same was made. Again, if there has been a compliance with the formalities required, and the French Courts hold that, thereby or otherwise, the testator has acquired a French domicile, then, by the general law of nations, the law of France must determine the validity of the will. But here again there is no conflict between the operation of the two acts; for c. 114 merely states in express terms what without such expression would have been the result, viz. that the will shall be held to be well executed if made according to the forms required by the law of France, which, *ex hypothesi*, it was.

Now let us vary the hypothesis and take the case of the will (of the same testator as above supposed) having been made in France, and well executed according to the law of England, but not according to the law of France. If the testator has not complied with the formalities required by c. 121, or if, notwithstanding compliance, the French Courts repudiate the French domicile of the testator, the will has been executed in accordance with the law of the domicile, and c. 114 does not conflict with, but merely affirms, the general law. But if it be held that by compliance with the formalities required by c. 121, or otherwise, a French domicile has been acquired, then, by the general law of nations, the law of France (and of France alone) must govern the form of the will of moveables and the solemnities of its execution. By the French law, the will is, by hypothesis, invalid; but 24 & 25 Vict. c. 114, says that, notwithstanding the French domicile, the will shall, as regards personalty, be held to be well executed for the purpose of being admitted to probate if the same be made according to the forms required by the law of England, the place where the testator had his domicile of origin.

Again, suppose an Englishman domiciled in Prussia, comes over to England for the purpose of making his will, and executes it in

accordance with English law, but not in accordance with Prussian law. By the 2nd sect. of c. 114, that will, notwithstanding the Prussian domicile, and notwithstanding that the execution be invalid according to Prussian law, shall be held to be well executed and admitted to probate in this country.

In these cases, therefore, and probably in others, there would appear to be a direct conflict between the operation of c. 114 and c. 121, or rather between c. 114 and the general law of nations. And to avoid this conflict it will probably be held (as suggested by Lord St. Leonards, R. P. Stat. 408), that c. 114 does not apply to the case of a testator who has acquired a domicile in any foreign state with which, under c. 121, a convention may have been made.

See also, as to these statutes, 4 Dav. Conv. (by Waley) 264, n. (a).

Restrictions on the dealing with personalty, imposed by the will of an Englishman domiciled abroad, executed with the forms required by the law of his domicile, if of a nature recognized by the English law, will be upheld by our Courts, even though such restrictions are not recognized by the *lex domicilii decedentis*; see *Peillon v. Brooking* (25 Be. 218), which referred to restraints against anticipation by a married woman; and *Van Grutten v. Digby* (31 Be. 561), where a settlement of personal property in England, made in English form, in contemplation of marriage with a Frenchman, was upheld, though such settlement was void according to the law of France.

As to restrictions on dealing with personalty.

The domicile at the time of his death of an owner of personalty determines whether it is or is not liable to legacy duty; when a British subject or a foreigner dies domiciled in England, all his personal estate, wherever situate, is to be regarded as English estate, and therefore liable to duty; but if he dies domiciled out of England, then the whole of his personal property, wherever situate, is to be regarded as situate in the country of domicile, and therefore exempt from duty (*Thomson v. Advocate-General*, 12 C. & F. 1, 9 Jur. 217, 13 Sim. 153; *Re Steer*, 3 H. & N. 594; *Cockrell v. Cockrell*, 4 W. R. 730; *Attorney-General v. Napier*, 6 Exch. 217; *Attorney-General v. Fitzgerald*, 3 Drew. 610; *Lyall v. Paton*, 25 L. J., N. S., Ch. 746; *President of U. S. A. v. Drummond*, 33 Be. 449). From the Scotch case of *Advocate-General v. Grant* (cited in 12 C. & F. 16), it would seem that legacy duty is payable on legacies out of real estate in England, even though the testator died domiciled abroad. There is an express exemption from duty in Ireland of any legacy given for any purpose merely charitable (56 Geo. 3, c. 56; 5 & 6 Vict. c. 82, s. 38); it would therefore seem that charitable legacies bequeathed by testators domiciled in Ireland, even though to English charities,

Legacy duty.

DOMICILE.
24 & 25 Vict.
cc. 114, 121.

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Succession duty.

As to succession duty, see *post*, p: 571.

Probate duty, liability to, depends on the local situation of assets at testator's death.

Probate duty, which is governed by rules different from those affecting legacy duty, is not payable in respect of property in a foreign country belonging to a testator dying domiciled in this country, although the property be brought into this country by the executor to be administered (*Attorney-General v. Dimond*, 1 Cr. & J. 356). It is not the administration of assets which renders the probate duty payable, but the local situation of the assets at the testator's death (*ib.*); see also *Attorney-General v. Hope* (8 Bli. 44, 2 C. & F. 84). Those two cases have in effect decided that French *Rentes* and American stock (which are part of the national debt of France and America respectively, and transferable there only), and debts due from persons resident in America, are not assets locally situate here (1 Wms. Exors. 587). And a similar decision was given as to certain local Indian stock in *Pearse v. Pearse* (9 Sim. 453). But Russian, Danish and Dutch bonds, being in the province of Canterbury at the time of the death of the testatrix, which bonds were marketable and transferable by delivery only, no act out of England being necessary to a complete transfer, were held liable to probate duty (*Attorney-General v. Bouwens*, 4 M. & W. 171). Shares in a German Mining Company have been held to be personal estate, and therefore not subject to the *lex loci rei sitæ* (*Ex parte Richardson*, cited 5 Jarm. Byth. 696). The liability in case of intestacy to the payment of duty upon the letters of administration in respect of foreign assets will be governed by the same rules as are applicable to probate duty under similar circumstances.

Stamp duty on letters of administration.

Names of further cases on domicile.

See further as to Domicile, *Frere v. Frere* (5 No. Cas. 593), upon the will of a British subject domiciled in and dying at Malta; *Re Howard* (*ib.* 616), upon the will of a British subject domiciled in England, and dying in Norway; *Maltass v. Maltass* (3 Cur. 231, 1 Rob. 67), as to the will of an Englishman dying in Turkey; *Collier v. Rivaz* (2 Cur. 855), on the will of a British subject dying domiciled in Belgium; *Re Osborne* (4 W. R. 164), on the will of an Englishman domiciled in Spain; *Reynolds v. Kortright* (18 Be. 417), a case upon a will written in Spanish of an Englishman dying whilst on a pleasure trip in Cuba; *M'Cormick v. Garnett* (5 D. M. & G. 278), *Duncan v. Cannan* (7 D. M. & G. 78), both cases on the Scotch law of husband and wife; *Aikman v. Aikman* (3 Macq. 854); and *Re Wright's Trusts* (2 K. & J. 595), a case in which it was held that a child born before marriage of a domiciled Englishman by a

French woman was not, by the subsequent marriage in France of the putative father and the mother, made legitimate so as to share in a bequest to children contained in the will of a person in England. See also *Allardice v. Onslow* (10 Jur., N. S. 352); *Jopp v. Wood* (34 Be. 88).

That a man cannot, for purposes of succession, have two domiciles, see *Forbes v. Forbes* (Kay, 341). As to a trading company, see *Carron Co. v. Maclaren* (5 H. L. C. 416); and as to a foreigner obtaining in this country a domicile for the purposes of commerce, see *Re Capdevielle* (2 H. & C. 985).

It has been before stated that a will of realty is governed by the *lex loci rei sitæ*, while in regard to a will of personalty (unless made in exercise of a power, which case is an exception, *ante*, p. 537, and unless the will come within the operation of 24 & 25 Vict. c. 114, *ante*, p. 538), the *lex domicilii testatoris* prevails. It has been disputed whether these rules apply to terms for years in hereditaments situate in England. The point is important, for it would seem to be a case not unlikely to occur, that a person domiciled in Scotland (for instance) should die possessed of English leaseholds for years. On the one hand, it is argued that the distinction in the civil law between immoveables and moveables, does not correspond exactly with the distinction in English law between realty and personalty—that leaseholds for years belong to the class of immoveables—and therefore, in a system founded on the civil law, are subject to the rule of the civil law with regard to immoveables, and devolve according to the *lex loci*, i. e. the English law, whatever the domicile of the owner at the time of his death. (See 1 Jarm. Wills, 4, n. (k).) On the other hand, it is argued that, though it be true that the distinction between immoveables and moveables is not precisely co-extensive with that between realty and personalty, yet the civil law distinction has given place to, and is superseded in the English law by, the distinction between real and personal estate; and that, the leasehold being in England, the law of England must determine whether it is real or personal—that as to the kind of property, the *lex loci* applies, and decides that the leasehold is personalty,—and that then the *lex domicilii* comes in to determine who are the parties beneficially entitled to the personalty. (See 11 Jarm. Byth. 15; Deane, Wills, 26; 4 Dav. Conv. by Waley, 264; *Price v. Dewhurst*, 4 M. & C. 81; *Jermingham v. Herbert*, 4 Rus. 388; *Pearmain v. Twiss*, 2 Gif. 136). It is submitted that the latter argument must prevail, and that the devolution and distribution of leaseholds for years in England are regulated by the *lex domicilii*.

Where confirmation of the executor of a testator domiciled in Scotland.

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Two domiciles.

Leaseholds for years in England.

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land has been sealed in the English Court of Probate (21 & 22 Vict. c. 56, s. 12), the executor has all the powers of an English executor, and may sell leaseholds in England, although specifically bequeathed, and although by Scotch law an executor cannot deal with leaseholds in that country (*Hood v. Lord Barrington*, L. R., 6 Eq. 218).

Distribution
by the *lex*
domicilii.

The doctrine that, in regard to personalty, the *lex domicilii* prevails, respects only the devolution and distribution of the property, and not the administration thereof: for the Court of Administration is, by our law, regulated by the *lex loci rei sitæ*; and the estate must be administered in the country in which possession is taken of it under lawful authority (*Preston v. Lord Melville*, 8 C. & F. 1). See also *Lopez v. Burslem* (4 Moo. P. C. 300); *Campbell v. Beaufoy* (Joh. 326); *Enohin v. Wylie* (10 H. L. C. 1; 10 W. R. 467).

Administra-
tion by *lex*
loci.Validity of
marriage as
affected by
domicile.

The law of domicile, in addition to its influence on the devolution of property by its bearing on the validity of wills, affects such devolution by its bearing on the validity of marriages. That the law of the country in which a marriage is solemnized does not render valid a marriage prohibited by the law of the country in which the contracting parties are domiciled, see *Brook v. Brook* (3 S. & G. 481; affirmed, 9 H. L. C. 193, 9 W. R. 461); the forms of entering into the contract of marriage are regulated by the *lex loci*, but the essentials of the contract depend upon the *lex domicilii*. See also *Mette v. Mette* (1 Sw. & Tr. 416); *Simonin v. Mallac* (2 Sw. & Tr. 67); *Argent v. Argent* (4 Sw. & Tr. 52); *Chapman v. Bradley* (33 Be. 61); and the important case of *Fenton v. Livingstone* (3 Macq. 497, 7 W. R. 671), where it is decided that a child, born of a marriage voidable but not void in the country of the contractor's domicile, and which child enjoys in that country the status of legitimacy, cannot take by inheritance real estate situated in a country, where such a marriage is void and incestuous. The rule that a personal status accompanies the person everywhere is subject to this qualification, that it do not militate against the law of the country where the consequences of that status are sought to be enforced; thus in England a *post natus* son cannot inherit from his father (*Birtwhistle v. Vardill*, 7 C. & F. 895, 5 B. & C. 438), nor can a father inherit from his *post natus* son (*Re Don's Estate*, 4 Drew. 194). Every nation is at liberty to define incest for itself: but the *comitas gentium* does not require that country A. should, *quoad* realty in A., recognize the validity of marriages, void by the law of A., contracted by persons domiciled in country B., even though such marriages may be valid by the law of B. Doubtless, the general rule is, that the validity of a marriage and the legitimacy of a child is to be determined by the *lex domicilii*: but in deciding upon the title to real estate, the *lex loci rei sitæ* must always

prevail. Thus, so far as consequences in England are concerned, an English marriage between English persons, resident but not domiciled in Scotland, cannot be dissolved by a Scotch Court, and a Scotch marriage duly solemnized between the divorced wife and an Englishman who was thenceforward domiciled in Scotland did not give to their children the character of "lawfully begotten" so as to enable them to take real estate in England under the will of an English testator (*Shaw v. Gould*, L. R., 3 H. L. 55); see also *Birt v. Boutinez* (L. R., 1 Div. 487), as to divorce by a foreign Court. And as regards personalty bequeathed by the will of a testator domiciled in England, the will must be construed according to English law; thus, under a gift to the children of A., a person who acquired a French domicile, who had a child by a French lady whom he afterwards married, and thereby legitimatized the child according to the French law, it was held that such child was not entitled (*Boyes v. Bedale*, 1 H. & M. 798).

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III.

ON A TESTAMENTARY CHARGE OF DEBTS.



Charge of
debts on real
estate.

It is very common to find wills commencing with a clause like the following:—"I direct that my debts, funeral and testamentary expenses be paid," without expressly conferring on any specified persons a trust or power for the purpose of working out the charge of the debts on the real estate which those words have been held to create.

Any form of words amounting to an expression of intention that the testator's debts shall be paid by any other persons than the executors will amount to a charge of debts on the real estate. The following have been held to have that effect, namely, "I direct my debts to be paid," "my debts being first paid," "after paying my debts;" and other similar expressions which will be found collected, 2 Jarm. Wills, 555, *et seq.*

But if the debts are directed to be paid by the executors, the real estate, unless it also is devised to the executors, is not charged with the debts (*Id.* 564).

The consequence of wills containing some such general words as are above referred to, but not expressly providing the requisite machinery for working out the charge, has been a vast amount of litigation of the most unsatisfactory kind, resulting in irreconcilable decisions, tending to throw doubt upon innumerable titles.

Questions
which may
arise.

Various perplexing questions arise, of which it may be sufficient to allude to the following:—

1. What is the distinction, and what are the consequences of the distinction, between a mere general charge of debts, and such a charge as is created by a devise to trustees upon trust to sell—in fact a trust for sale?

2. What is the distinction, and what are the consequences of the distinction, between a devise expressly upon trust to pay debts, and a beneficial devise subject to a charge of debts?

3. Who is the proper person to sell or mortgage real estate charged with debts for the payment of those debts? Is the executor authorized to sell?

4. Who is the proper person to receive the purchase-money?

The devisee, or the executor? or the devisee and the executor jointly?

CHARGE OF
DEBTS.

5. How is the purchaser affected by notice of the state of affairs at the time of the sale? Has he a right, or is he concerned, to know that debts of the testator remain unpaid? Is he bound to see to the application of the purchase-money?

6. When a charge of debts has once been fastened on the land, can the title be made clear and free from objection, without an actual sale by the person on whom is imposed the duty of working out the charge?

It has recently been laid down by Lord *St. Leonards*, in the important case of *Stroughill v. Anstey* (1 D. M. & G. 635), that if a trust be created for the payment of debts and legacies, it is by implication a declaration by the testator that he intends to intrust the trustees with the receipt and application of the money, and the purchaser or mortgagee is in no case bound to see to the application of the money raised. The testator invests his trustees with power to receive the money in the anticipation that there will be debts to be paid, but the intention does not cease to operate because there are no debts. People, however, "who deal with trustees raising money at a considerable distance of time, and without an apparent reason for so doing, must be considered as under some obligation to inquire and to look fairly at what they are about." (See 1 D. M. & G. 653, 654.)

Trust for
payment of
debts.
Stroughill v.
Anstey.

But suppose there is not an express trust created for payment of debts, but a devise subject to a mere charge of debts, can the executor sell? Does the charge raise an implied legal power, *i. e.*, a power under which the executor can pass the legal fee, in defeasance of the title of the devisee? Prior to the decision in *Shaw v. Borrer* (1 Ke. 559), it was the recognized doctrine that, where land is charged generally with the payment of debts, the ownership goes on for all purposes of transfer—subject to the equitable charge till satisfied, but otherwise—as freely as if that charge had not been created, and whenever the owner for the time being makes a *bonâ fide* sale or mortgage, and receives the money, the purchaser or mortgagee is absolved from all liability in respect of the application of the money.

Devise sub-
ject to
charge of
debts: or, a
mere charge
of debts.

The question at law is free from doubt. A general charge of debts does not give the executor by implication a legal power to sell real estate, and he cannot convey the legal estate (*Doe v. Hughes*, 6 Exch. 223; see also *Kenrick v. Lord Beauclerk*, 3 B. & P. 175; *Doe v. Claridge*, 6 C. B. 641). The legal estate passes to the devisee, or descends to the heir, subject to an equitable charge, *i. e.*, a charge

General
charge of
debts does
not give ex-
ecutor a legal
power to sell.

CHARGE OF
DEBTS.The cases in
equity.*Shaw v.
Borrer, &c.**Robinson v.
Lowater.**Eidsforth v.
Armstead.**Sabin v.
Heape.*

to be enforced by a Court of Equity in the usual course of administration.

The case in equity with which the difficulty began is *Shaw v. Borrer* (1 Ke. 559), decided in 1836. This was followed by *Ball v. Harris* (4 M. & C. 264), in 1838; *Forbes v. Peacock* (12 Sim. 528), in 1843; *Gosling v. Carter* (1 Col. 644), in 1845; *Robinson v. Lowater* (17 Be. 592, affirmed 5 D. M. & G. 272), in 1854; *Wrigley v. Sykes* (21 Be. 337), in 1856; *Eidsforth v. Armstead* (2 K. & J. 333), in 1856; *Sabin v. Heape* (27 Be. 553), in 1859; and *Greetham v. Colton* (34 Be. 615), in 1865. Through this series of cases (involving, of course, a great variety of details), the power of sale, once created, has been gradually shifted from the devisee to the executor in concurrence with the devisee, and finally to the executor alone. The doctrine of *Eidsforth v. Armstead* is, indeed, somewhat different, viz., that the charge of debts raises an implied power of sale in some one, and that the donee of the power is to be ascertained from the whole will. But the executorial authority culminated in *Sabin v. Heape*, where it was held that, under the implied power of sale raised by a general charge of debts, the executors of an executor could sell over the heads of devisees who had been twenty-eight years in possession, that the purchaser was not bound to see to the application of the purchase-money, and was not entitled to know whether any of the testator's debts remained unpaid.

In *Cook v. Dawson* (29 Be. 123), it is stated as follows:—"In the first place, it is clearly established, that where there is a general charge of debts on the real estate, the executor has power to sell the estate for that purpose, and that the purchaser is not bound to look to the application of the purchase-money. . . . The authorities further determine, that where the testator gives a general direction that his debts shall be paid, this amounts to a charge of the debts generally on the real estate, at least in all cases where the real estate is afterwards disposed of by the will. But an exception obtains where the direction that the debts shall be paid is coupled with the direction that they are to be paid by the executor, in which case it is assumed that the testator meant that the debts should be paid only out of the property which passes to the executor. . . . But this exception is again liable to another exception, namely, where the will contains a devise of land to the executors, there the direction that the debts are to be paid by the executors does not affect the validity of the general charge of debts."

The decision in the above cases in favour of the executor being the person to raise the money for payment of debts, rests upon the

argument that he is the person who would have to apply the money when raised. But it is not clearly settled that the duties of an executor, *quà* executor, are confined to his testator's personality? If an executor in that capacity has any power over realty, it can only be from the expression by the testator of an intention to that effect, or the clear implication of such an intention by the terms of the will. And it may be remarked, that it was on the ground of such an intention manifested by the will that the Lord Justice *Turner* affirmed the decision in *Robinson v. Lowater*.

CHARGE OF
DEBTS.

If executor is to raise money by sale of realty, it must be by virtue of an intention of testator to that effect.

In *Colyer v. Finch* (5 H. L. C. 905; 3 Jur., N. S. 25), Lord *Cranworth*, C., said: "Where there is a general charge of debts, and no legal estate given anywhere, it may be that, as against the heir-at-law, an executor may, by implication, sometimes, perhaps always, have impliedly a power to convey the legal estate in order to raise the money; but that doctrine certainly does not apply to a case where the estate is devised to others or to another, charged with certain payments of debts or legacies. There, that money is to be raised through the instrumentality of a sale by the devisee, and that devisee there is the person, and the only person, that can make a legal title."

Again, assuming that the executor is the proper person to apply the money when raised, it does not follow that he is the proper person to raise it. A right to receive the money to arise from the sale of an estate is not the same thing as a right to sell the estate: if it were, every person who has an equitable charge on an estate would have the right to sell it.

Right to receive money from sale, different from right to sell.

Also, if a direction to pay debts gives an executor power to sell lands, it ought to follow that a testator's direction, that his debts should be paid by his executor, gives the executor a like power. But this is not the case (*supra*, p. 548), unless the executor is also devisee: and then he sells, not as executor, but as devisee. The doctrine of *Robinson v. Lowater*, taken in conjunction with the recognized doctrine of the Courts, leads then to this anomaly, that where a testator simply directs his "debts to be paid" (without saying by whom), the executor takes an absolute power of sale of all the real estate: but where a testator directs his debts "to be paid by his executor," the executor has no power whatever over the real estate.

Direction that debts be paid by executor does not give implied power to sell realty.

In all the cases prior to *Robinson v. Lowater*, in which the executor was held to take an implied power of sale, there were either express directions for sale, or words from which nothing else could reasonably be implied. The only doubt was as to the person who should carry out the direction. In *Robinson v. Lowater*, however,

Robinson v. Lowater.

CHARGE OF
DEBTS.
—

there was no direction to sell, express or implied : a mere charge of debts, and nothing more. Why should a charge of debts imply a power of sale in any one ? An ordinary charge upon an estate does not confer a power of sale.

Power collateral, cannot be released.

Let it be remembered, too, that this implied power of sale, being a power "simply collateral," is incapable of being released. When once created, therefore, it becomes a perpetual incumbrance on the title, unless a sale, whether necessary or unnecessary, is actually made under the power. To avoid this serious inconvenience, it seems probable that it would be held, that, on a sale of the charged lands by the devisee, the executor, by authorizing the payment of the purchase-money to the vendor, binds all parties claiming in respect of a right to have moneys raised out of the lands, which, if so raised, would have to pass through the executor's hands. See *Storry v. Walsh* (18 Be. 559).

Storry v. Walsh.

Opinions of writers and eminent conveyancers.

The doctrine in question has met with the modified approval of Mr. Clayton, in his "Elements of Conveyancing;" but the preponderance of opinion of text-writers and conveyancers is opposed to the decisions above referred to ; see the tract of Mr. Joshua Williams, "On the power of an executor to sell real estate under a charge of debts," containing the opinions of Mr. Hayes and Mr. Christie ; J. Williams, *Real Assets*, ch. 6 ; Dart, V. & P. 401, 476 ; and Sugd. V. & P. 662, n., where Lord *St. Leonards* speaks of the decisions in *Robinson v. Lowater* and *Wrigley v. Sykes* as having introduced considerable difficulty upon titles ; see also *Cook v. Dawson* (3 D. F. & J. 127) ; *Hodkinson v. Quinn* (1 J. & H. 303) ; *Howard v. Chaffers* (2 Dr. & S. 236, 245, 249).

The result of the cases has been thus stated : "Where there is a general charge of debts upon real estate, the executors have in equity an implied power to sell it, and they alone can give a valid receipt for the purchase-money ; but as they do not take by implication a legal power to sell, and cannot therefore convey the legal estate, the persons in whom it is vested (if it be not already in the executors by devise or otherwise) must concur with them in the conveyance" (see the notes to *Elliot v. Merryman*, 1 Wh. & Tud. L. C. Eq. 51). In other words, that the executors take an equitable power of sale, and the holder of the legal estate is a trustee for them (Lewin, *Trusts*, 340, *et seqq.*).

Decisions at law must ultimately prevail.

It should, however, be borne in mind, as mentioned by Mr. Dart (V. & P. 403), that "in all cases where the legal title depends, or may eventually depend, upon the implying or not implying a legal power, the question is purely a legal one ; and consequently the validity of the title will or may have to be decided in ejectment.

The decisions of Courts of Law, therefore, must ultimately prevail on this question."

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DEBTS.

It is submitted that the true principle is, that a mere general charge of debts creates neither a trust for sale nor a power of sale. The creditors of the testator have undoubtedly, under a charge of debts, the same right to the realty as if there were a trust or power of sale: but their proper remedy is by application to an Equity Court for the administration of the estate. If, however, the doctrine of *Shaw v. Borrer* and *Bull v. Harris*—that a power of sale is created by a charge of debts—be considered too firmly established to be now overruled, it is submitted that the proper person to exercise the power is the devisee (or heir) in whom the legal estate is vested, and not the executor. That whenever lands, subject to a charge of debts, are *bonâ fide* sold or mortgaged by the owner for the time being claiming through the testator, and such owner receives the money, the land so sold or mortgaged is from that time exonerated from the charge, and the purchaser or mortgagee is exonerated from all liability to see to the application of the money: the exoneration of the purchaser or mortgagee being founded, first, on the impossibility of his ascertaining the state of the testator's affairs, and, secondly, on the fact that the money in the hands of the vendor or mortgagor is primarily applicable to the payment of debts, if any then exist.

The true
principle
suggested.

In the present state of the authorities, there seems to be an imperative demand for a broad and simple rule, to the effect that a beneficial devise subject to a general charge of debts and legacies is indefeasible by any implied power lodged in the hands of others than the devisee, and that such a devise carries with it, through all subsequent modifications of the ownership, a capacity to confer a clear title on a purchaser or mortgagee, as against dormant creditors and legatees of the original testator.

Rule sug-
gested.

Sections 14—18 of Lord *St. Leonards'* Act, 22 & 23 Vict. c. 35, relate to the subject of this note, and are intended to remove for the future the difficulties which have occurred in some of the previously cited cases. Sect. 14 enacts, that where a testator (dying after the 13th August, 1859) charges his debts or legacies upon his real estate, but creates no trust or other machinery for working out the charge, and, subject to such charge, devises the estate to trustees for the whole of his (the testator's) interest therein, it shall be lawful for the devisees in trust (not the executors) to raise the money by sale or mortgage, notwithstanding any express trusts declared by the testator. But if the testator has not devised the estates, charged as aforesaid, in such terms as that his whole estate and interest therein becomes vested in trustees, then (by sect. 16) the executors are em-

22 & 23 Vict.
c. 35, ss. 14—
18.

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—

powered to sell or mortgage for the payment of debts. But (by sect. 18) these provisions do not apply to a beneficial devise of real estate in fee, or in tail, or for the testator's whole interest therein ; nor do they affect the power of the beneficial devisee to sell or mortgage as he might have done before the Act. All sales or mortgages made prior to the 13th August, 1859, are saved from the operation of the Act ; and (as before stated) the Act applies only to the case of a testator who has died since that day. (See Sugd. V. & P. 502, and *Hunter's* and *Langley's* respective editions of the Act to amend the Law of Property ; the question, what estate the trustees take under a devise to them, appears to be left untouched by these sections ; see *Hawkins, Constr. Wills*, 151, n.)

Cases in
which the
difficulty is
removed.

The difficulty has thus been removed in two cases : 1st, by giving a devisee of the fee, who is a trustee for totally foreign purposes, a power to sell or mortgage for the satisfaction of the charge of debts ; and 2ndly, by giving the executor power to sell or mortgage when the estate is cut up by successive limitations without the intervention of a trustee of the legal fee. But in the cases where the testator died before the 13th August, 1859, or where there is a devise subject to the charge of debts, to a beneficial owner in fee or in tail, or for all other the testator's interest in the estate, the Act leaves this question in the same doubt and perplexity as before.

Cases in
which the
difficulty
remains.

No testator then ought to create a charge of debts upon his real estate, without at the same time expressly creating a trust or power for giving effect to the charge, and without distinctly pointing out the persons by whom the trust or power is to be exercised. It is on this principle that the forms of wills contained in this volume have been framed. It will be noticed that words amounting merely to a charge of debts, without the proper machinery for fully working out the charge, have been omitted.

IV.

OF THE EXECUTION OF WILLS AT THE CAPE
OF GOOD HOPE (*a*).

THE Roman Dutch law as administered in Holland prior to the introduction of the Code Napoleon in 1811—that is, the Roman law as modified by Dutch local laws and customs—may be called the common law of the Cape. But, besides this common law, there are in force in this colony, (1) Acts of the Imperial Parliament extending to the colony; (2) Laws made by Letters-Patent and Orders in Council, whilst the Cape was a Crown colony, and before the grant of representative institutions in 1852; and (3) Acts of the Colonial Legislature.

Laws in
force at the
Cape.

1. *As to Wills made at the Cape of Good Hope.*

Down to 1844, the Cape law respecting the execution of wills was almost identical with the Roman law. The Roman law required seven witnesses to a will, five to a codicil; males only could be witnesses to a will, but females were allowed as witnesses to a codicil. The Dutch law permitted wills to be made before a Notary Public and two witnesses. The Roman law preserved with strictness the distinction between wills and codicils; there could be no heir without a will (this, of course, does not refer to a case of pure intestacy), and no will without an heir. The Dutch law is less strict: it does not, indeed, appear that by Dutch law there can be an heir without a will, but it seems clear that there can be a will without an heir.

Execution of
wills—prior
to 1844;

The Colonial Ordinance, No. 15, 1845, made an important alteration in the Cape law respecting wills or testamentary writings made on or after 1 January, 1844, by substituting two witnesses for the greater number previously required. The language of this Ordinance was mainly copied from the 1 Vict. c. 26, s. 9 (*ante*, p. 9), omitting

—after 1843.

(*a*) The substance of this note was communicated by the Hon. William Porter, formerly Her Majesty's Attorney-General at the Cape of Good Hope.

WILLS AT THE CAPE. — however the concluding words, “but no form of attestation shall be necessary.” But the Ordinance requires that each leaf of the testamentary writing shall be signed by the testator and witnesses, and does not remove the disability of women to be witnesses to a will (as distinguished from a codicil).

Codicillary clause. Two clauses are almost invariably inserted in Cape wills. One expresses the testator's wish that if his disposition cannot take effect as a will, it may take effect as a codicil: this is called the codicillary clause. The other reserves to the testator the right to make, under his own hand, such alterations in or additions to his will, as he may think fit, by a separate writing, or at the foot of the will itself: this is called the reservatory clause.

Executors: Administration. There are, at the Cape, two sorts of executors, executors testamentary and executors dative. The former correspond with the English executor; the latter with the English administrator. But both classes of executors act under letters of administration issued by the Master of the Supreme Court in Cape Town, with whom all wills are, by the Colonial Ordinance, No. 104, 1833, ordered to be deposited. The Master's office, however, is not a Court of Probate: when a will is lodged with him which appears to be in proper form, and which is presented under circumstances that cast no doubt upon its authenticity, he files the will, and grants letters of administration. But if the Master has reason to think that any particular will tendered to him is not valid, the matter is brought by motion before the Supreme Court, which either disposes of it at once, or directs pleadings to be filed.

Community of goods between husband and wife. Restrictions on disposal by will. The Cape law establishes a community of goods between husband and wife (unless excluded by ante-nuptial contract), that is, an equal partnership in all property vested in either at the time of the marriage, or acquired by either during the marriage. The freedom of testamentary disposition is restricted, in favour of children, as follows: the parent who leaves four or more children cannot disinherit them of one-half of his property, each child being entitled to an equal share in that half; when the children are fewer than four, the parent has testamentary power over two-thirds, instead of half, of his property.

Falcidian portion. Moreover, the heir who is burthened with legacies exhausting more than three-fourths of his testator's net assets, is entitled to deduct and keep for himself a clear fourth (called the Falcidian portion), and the legacies abate in proportion. And if the heir be burthened with a *fidei commissum* or trust in respect of more than three-fourths of the assets, he is likewise entitled to retain a clear fourth part for himself (called the Tribellianic fourth).

Tribellianic fourth.

A will made after 1843 was written on three pages of a sheet of foolscap, and signed by the testator and witnesses on the third page only, at the foot of the will. It was objected that the will was written on two leaves, and that one only was signed. It was answered that there was but one separate and distinct piece of paper, and that whether the will were written, on that piece of paper, book-wise or brief-wise, could make no difference; there was still but one leaf. But the Court held that this will was not duly executed.

Cases on the Ordinance No. 15, 1845. Every "leaf" of will must be signed.

A testator, in 1854, made, in Cape Town, the following disposition: "I, A. B., hereby bequeath all the property I possess, after my debts are paid, to C. D. and E. F." This paper was witnessed by two persons, one of them a female. The heir *ab intestato* of A. B. contended that this instrument was a will, and not a codicil; that C. D. and E. F. were heirs, not legatees; and that the will, being attested by an incompetent witness, was null and void *in toto*. On the other hand, C. D. and E. F. urged that the reason why females had been incapacitated as witnesses to wills had ceased; *cessante ratione cessat ipsa lex*; and that the instrument might be supported as a codicil, even if it failed as a will by reason of the incapacity of the witness. The Court decided that females could not by law be witnesses to a will, but held the instrument in question valid as a codicil; the effect of which was that C. D. and E. F. received the assets, less the Falcidian portion of the heir *ab intestato*.

Females incapable of being witnesses to a will.

The effect of the reservatory clause was considered in reference to the will of Sir John Wylde, the late Chief Justice of the Colony, who died at Cape Town in December, 1859. By his will, duly signed by himself and two witnesses on each leaf, he appointed certain executors; by virtue of the reservatory clause in this will, he, by an unwitnessed codicil, changed the appointment of executors, and left certain legacies. It was doubted whether, before or after the Ordinance No. 15, 1845, the reservatory clause contained in a will not executed before a notary and witnesses could establish an unwitnessed codicil. The Court, however, whilst questioning the policy of the reservatory clause in any will notarial or not notarial, held that it had been legal and effectual in wills made before 1844, and attested by seven witnesses, and that the Ordinance No. 15, 1845—which merely made two witnesses sufficient, where seven or some other number had been required by the previous law—had in this respect made no change.

Effect of reservatory clause.

The effect of the codicillary clause is illustrated by the following case. Prior to 1844, A. B. died in Graham's Town, having made a will appointing his wife as his sole and universal heir: the will purported to have been executed in the presence of seven witnesses, but

Effect of codicillary clause.

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CAPE.

it subsequently turned out that one of the seven had signed at the testator's request, without seeing the testator or any of the other witnesses sign. The Court held the instrument invalid as a will for want of seven witnesses, but valid as a codicil duly executed in the presence of and attested by five witnesses. But for the codicillary clause, the widow of the testator would, in this case, have taken nothing whatever; as it was, the heir *ab intestato* took the estate, deducted the Tribellianic fourth, and held the remaining three-fourths in trust for the widow.

Joint wills
by husband
and wife.

The community of goods between husband and wife makes the use of joint wills extremely common at the Cape. In nine cases out of ten, the joint will of husband and wife makes the survivor of the two with the children of the marriage the heirs of the first dying; then, on the death of the first dying, the estate is halved, and the survivor, taking his or her half entire, divides the other half with the children, share and share alike. In what cases a surviving spouse is, by the terms of the joint will, deprived of the power of withdrawing his or her own half from some certain course of descent prescribed by the joint will for the whole joint estate, is a question of considerable difficulty. This question has, once at least, come before an English Court: see *Dufour v. Pereira* (1 Dick. 419), before Lord Camden. (See *ante*, p. 506.)

2. As to Foreign Wills disposing of Property at the Cape of Good Hope.

Immoveable
property.

The law of England requires that a will which is to pass real estate in England must, no matter where executed, be executed according to the forms prescribed by the law of England (*ante*, pp. 531, 545). But by the Roman Dutch law, a will executed according to the forms of the place where it was made will pass immoveable property, even though it be not executed according to the forms of the place where the immoveable property is situate. And this is true, though the will be made elsewhere than at the testator's domicile. The best Dutch jurists maintain, at the same time, that a will executed according to the forms required by the law of the place, not where the will is made, but where the immoveable property is situate, will also pass such property. They hold that either set of solemnities—those prescribed by the law of the place where the will is made, or where the property is situate—is sufficient (*b*).

Moveable
property.

With respect to moveables, these, wherever situated, will pass by a will executed with the solemnities either of the testator's place of domicile, or of the place where the will is made.

(b) See 4 Dav. Conv. by Waley, 269.

For the testamentary disposal, then, of property at the Cape, whether moveable or immoveable, it would seem to be sufficient for a testator, whether domiciled in England, or only temporarily resident there and retaining his domicile at the Cape, to execute his will with the formalities required by the English law.

Will made in England; compliance with English law sufficient.

At the same time, if the testator own immoveable property at the Cape, he will do well to comply with the formalities required by the colonial law, since it may be questionable how far the Supreme Court in the colony, or the Appeal Court in England, would, in deciding a point of general jurisprudence, and involving a conflict of laws, consent to be guided by the Dutch jurists, when opposed to all English, and to very many continental, authorities. And visitors to England, domiciled at the Cape, will also do well to execute their wills with the Cape formalities, and to insert the codicillary and reservatory clauses.

Suggestions as to compliance with Cape law;

The Colonial Ordinance, No. 104, 1833, (*ante*, p. 556,) cannot, of course, extend to the wills, made in England, of persons dying in England, and of which probate will be granted in England. If the Cape property be merely moveables, a probate copy of the will would (doubtless) entitle the English executor to obtain letters of administration at the Cape: a power of attorney to some person at the Cape, authorizing him to sue out letters of administration, ought to accompany the probate copy of the will. Without such letters of administration, it is doubtful whether an English executor could give a sufficient discharge to a Cape debtor, and it seems certain that he could not by legal process compel the payment of a Cape debt. If the Cape property be immoveable, and the Cape formalities have been complied with, then the attested copy should either be in fac-simile, or the Court of Probate, or a notary public, should certify that the testator and the witnesses had signed every leaf. But to make the will in duplicate, one original for the Court of Probate in England, and the other for the Master's office at the Cape, would seem to be a simple way of obviating all difficulty. If an original will, executed in England, were thus sent out to the colony, its authenticity would require to be established. Proof of handwriting might perhaps be had at the Cape, and that would suffice. But solemn declarations made by the witnesses, and attested in the usual manner, ought to be sent out with the will, to prove its authenticity.

—as to letters of administration at the Cape;

—as to execution of will in duplicate;

—as to proof of authenticity of original will.

V.

DEPOSITORY FOR WILLS OF LIVING PERSONS.

Instructions to Depositors.

IN pursuance of the provisions of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77, s. 91), (see *ante*, p. 309), the Principal Registry of the Court of Probate, 6, Great Knight Rider Street, Doctors' Commons, London, has been provided as a depository for the wills of living persons, and testators are at liberty to deposit their wills, or codicils to such wills, therein, under the following regulations:—

The will or codicil to be deposited must be inclosed in a sealed envelope and delivered to one of the Registrars of the Court at the Principal Registry, either by the testator himself, or by some person specially authorized by him to deposit the same on his behalf.

The will or codicil so deposited will not be delivered up to any person, but must remain in the registry until after the testator's death.

In case the testator himself deposits his will or codicil, he will be required to sign his name, in the presence of the Registrar, to an endorsement on the envelope in which the will or codicil is enclosed, to the following effect:—

"This sealed packet contains the last will and testament, or codicil to the last will and testament, or last will and testament and codicil thereto, bearing date respectively [*here state the dates of all the papers enclosed*], of A. B. of &c., whereof C. D. of &c., and E. F. of &c., are appointed executors, and the same are brought into the Principal Registry of Her Majesty's Court of Probate by me for safe custody, there to remain deposited until after my decease." *The residences of the testator and of the executors should be set forth in this endorsement, and also the date of signature.*

In case the testator authorizes some other person to deposit his will or codicil for him, he will be required to subscribe his name, in the presence of an attesting witness, to an endorsement on the envelope in which the will or codicil is enclosed, to the following effect:—

"This sealed packet contains the last will and testament, or codicil to the last will and testament, or last will and testament and codicil thereto, of me, A. B. of &c., whereof C. D. of &c., and E. F.

of &c., are appointed executors, and I authorize G. H. to deposit the same for safe custody in the Principal Registry of Her Majesty's Court of Probate, there to remain deposited until after my decease.

(Signed) A. B.

Witness, K. L."

The residences of the testator and of the executors, and the date of signature, should be set forth in this endorsement.

The packet containing the will or codicil must be accompanied by an affidavit from the attesting witness, to the effect that the signature of the testator to the above endorsement, witnessed by the deponent, is in the proper handwriting of such testator, and was by him signed in the deponent's presence on the day mentioned in the endorsement, and that the signature K. L. is in the proper handwriting of the deponent. An affidavit will also be required from the person authorized to deposit the packet, to the effect that the sealed packet produced for the purpose of being deposited for safe custody in the Principal Registry of Her Majesty's Court of Probate, and on the back of which the deponent has signed his name, is at the time of making the affidavit precisely in the same state, plight and condition as when received by the deponent from the hands of A. B. [the testator], on a day to be mentioned as that on which he received it.

The last-mentioned affidavit is to be sworn before the Registrar to whom the packet containing the will or codicil is delivered.

A Minute or Order will be drawn up by the Registrar setting forth the production of the packet containing the will or codicil, and the affidavits (if any), and when and by whom the same were produced, and the Registrar's order that the same be deposited in the Principal Registry for safe custody.

The following fees will be payable in Probate Court stamps :—

For depositing the will and receipt for same . . . £1 1 0

For drawing and entering Minute of the Registrar . 0 2 6

For filing each affidavit 0 2 6

Envelopes for wills and codicils, with the necessary endorsements and forms of affidavits, are to be had on application to the Record Keepers at the Principal Registry.

Testators are at liberty to transmit their wills and codicils to the Principal Registry, to be deposited there for safe custody, through a District Registrar of the Court of Probate, who will send the same by the general post in a registered letter.

The affidavit of the person authorized by the testator to deposit his will or codicil will in that case be sworn before the District Registrar to whom the packet containing them is delivered.

DEPOSITORY
FOR WILLS.
—

On production to the District Registrar of the sealed packet containing the will or codicils to be deposited and the affidavits (if any), he will draw up a certificate under his hand, setting forth when and by whom the same were produced to and left with him, and file this certificate in his District Registry, and he will transmit an office copy of the certificate, with the sealed packet and affidavits and form of receipt, to the Principal Registry. The receipt will be returned to him under the hand of one of the Registrars of the Principal Registry.

The following fees will be payable to the District Registrar in addition to the fees before mentioned:—

	£	s.	d.
For his certificate	0	2	6
For filing same	0	2	6
For office copy to transmit with the will or codicil	0	2	6
For receipt	0	1	0

VI.

TABLE OF PROBATE AND ADMINISTRATION
DUTIES.*See 55 Geo. 3, c. 184; 22 & 23 Vict. c. 36; 27 & 28 Vict. c. 56.*

WHERE the estate and effects for or in respect of which probate or letters of administration shall be granted (exclusive of what the deceased was entitled to as trustee, and not beneficially) shall be—

				Duty on Probate, and Letters of Administration with a Will annexed.	Duty on Letters of Administra- tion to the Effects of Intestates.
				£ s. d.	£ s. d.
Not exceeding the value of £100				<i>nil.</i>	<i>nil.</i>
Exceeding £100 and under the value of £200				2 0 0	3 0 0
Of the value of {	and {	under the value of			
£200		£300		5 0 0	8 0 0
300	..	450	..	8 0 0	11 0 0
450	..	600	..	11 0 0	15 0 0
600	..	800	..	15 0 0	22 0 0
800	..	1,000	..	22 0 0	30 0 0
1,000	..	1,500	..	30 0 0	45 0 0
1,500	..	2,000	..	40 0 0	60 0 0
2,000	..	3,000	..	50 0 0	75 0 0
3,000	..	4,000	..	60 0 0	90 0 0
4,000	..	5,000	..	80 0 0	120 0 0
5,000	..	6,000	..	100 0 0	150 0 0
6,000	..	7,000	..	120 0 0	180 0 0
7,000	..	8,000	..	140 0 0	210 0 0
8,000	..	9,000	..	160 0 0	240 0 0
9,000	..	10,000	..	180 0 0	270 0 0
10,000	..	12,000	..	200 0 0	300 0 0
12,000	..	14,000	..	220 0 0	330 0 0
14,000	..	16,000	..	250 0 0	375 0 0
16,000	..	18,000	..	280 0 0	420 0 0
18,000	..	20,000	..	310 0 0	465 0 0
20,000	..	25,000	..	350 0 0	525 0 0
25,000	..	30,000	..	400 0 0	600 0 0
30,000	..	35,000	..	450 0 0	675 0 0
35,000	..	40,000	..	525 0 0	785 0 0
40,000	..	45,000	..	600 0 0	900 0 0
45,000	..	50,000	..	675 0 0	1,010 0 0
50,000	..	60,000	..	750 0 0	1,125 0 0
60,000	..	70,000	..	900 0 0	1,350 0 0
70,000	..	80,000	..	1,050 0 0	1,575 0 0
80,000	..	90,000	..	1,200 0 0	1,800 0 0

PROBATE
DUTY.

				Duty on Probate, and Letters of Administration with a Will annexed.			Duty on Letters of Administra- tion to the Effects of Intestates.		
Of the value of }		and {	under the value of	£	s.	d.	£	s.	d.
£90,000			£100,000	1,350	0	0	2,025	0	0
100,000	120,000	1,500	0	0	2,250	0	0
120,000	140,000	1,800	0	0	2,700	0	0
140,000	160,000	2,100	0	0	3,150	0	0
160,000	180,000	2,400	0	0	3,600	0	0
180,000	200,000	2,700	0	0	4,050	0	0
200,000	250,000	3,000	0	0	4,500	0	0
250,000	300,000	3,750	0	0	5,625	0	0
300,000	350,000	4,500	0	0	6,750	0	0
350,000	400,000	5,250	0	0	7,875	0	0
400,000	500,000	6,000	0	0	9,000	0	0
500,000	600,000	7,500	0	0	11,250	0	0
600,000	700,000	9,000	0	0	13,500	0	0
700,000	800,000	10,500	0	0	15,750	0	0
800,000	900,000	12,000	0	0	18,000	0	0
900,000	1,000,000	13,500	0	0	20,250	0	0
1,000,000	15,000	0	0	22,500	0	0
Above the value of £1,000,000 and under the value of £1,100,000				16,500	0	0	24,750	0	0
Of the value of £1,100,000 and under the value of £1,200,000				18,000	0	0	27,000	0	0
And so on, for every additional £100,000, or fraction of £100,000, an additional duty of				1,500	0	0	2,250	0	0

Economy of
testacy.

This comparative Table is designed to show the economy of testacy. Persons refusing to make wills often excuse themselves by saying that if they die intestate, the law will give their property to the very persons to whom by their wills they would leave it. But supposing that the law does select the very persons, and divides the property amongst them in the very proportions which the present owner would himself desire, it is presumable that the latter wishes to leave as much as possible amongst the objects of his bounty, and to consume as little as possible in the payment of duties to Government. The preceding table shows that the Administration duty on an intestate's estate is half as much again as the Probate duty on a will disposing of property to the same amount.

Probate or
administra-
tion duty,

Probate or administration is granted only in respect of that property which, but for the existence of the will, the Ordinary (prior to the recent alteration in the law) would have been entitled to administer; and by this test the liability to duty is to be determined (4 Burn, Eccl. Law, 351). The amount of duty is regulated, not by the value of all the assets which the executor or administrator may

ultimately have to administer, but by the value of such part of the deceased's assets as are, at his death, within the jurisdiction of the Probate Court. In calculating the amount of duty payable, real estate (including profits arising from the tolls of a light-house, *Attorney-General v. Jones*, 1 M.N. & G. 574), even though devised to be sold (1 Wms. Exors. 588), or otherwise impressed in equity with the character of personalty (*Matson v. Swift*, 8 Be. 368; *Custance v. Bradshaw*, 4 Ha. 315), bad debts (*Moses v. Crafter*, 4 Car. & P. 524), debts due from persons abroad, and property locally situate abroad (compare *ante*, p. 544; as to ships at sea, see 27 & 28 Vict. c. 56, s. 4), are to be omitted from consideration; but there must be included in the affidavit of value all goods, chattels and credits locally situate in this country (and ships registered at any port in the United Kingdom are deemed to be at that port, though actually at sea or elsewhere out of the kingdom), bonds, debentures, &c. of foreign countries which are payable to bearer and transferable by delivery only (see *ante*, p. 544), personalty appointed by will in exercise of a general power (*ante*, p. 143), money secured on heritable property, and by heritable bonds in Scotland (23 & 24 Vict. c. 15, s. 6), and any interest accrued between the death and the grant of administration (*Attorney-General v. Partington*, 3 H. & C. 193). Moreover, since all money received by the executor or administrator by virtue of his office is liable to the impost, probate duty is payable on the purchase-money of real estate contracted to be sold by the testator, if the contract is completed after his death (*Attorney-General v. Brunning*, 8 H. L. C. 243; 8 W. R. 362). And the value of contingent interests must be included; or if not, and the interest afterwards falls into possession, the duty is payable on the value of the absolute interest (*Lord v. Colvin*, L. R., 3 Eq. 737).

PROBATE
DUTY.
—
—what is not
chargeable;

—what is
chargeable.

As to return of excess of duty, in respect of "debts due and owing from the deceased and payable by law out of his personal estate," if claimed within three years, see 5 & 6 Vict. c. 79, s. 23; which means such debts as of themselves are payable out of the personal estate, without reference to any provision which the testator may make in his will for their payment (*Percival v. The Queen*, 3 H. & C. 217).

And there is no return of duty for voluntary debts (24 & 25 Vict. c. 92, s. 3).

As to summary proceedings for payment of the duty, see 28 & 29 Vict. c. 104, s. 57.

By 31 & 32 Vict. c. 90, the Commissioners of the Treasury are authorized to pay sums under 100*l.* owing on the death of persons in the Civil Service, without the production of probate or letters of administration.

Single grant
of probate
now suffices
for the whole
kingdom.

Formerly, a grant of probate was valid only in that part of the United Kingdom over which the Court which granted it had jurisdiction. But now a single grant of probate, administration, or confirmation, suffices for the whole kingdom (20 & 21 Vict. c. 77, s. 23; 21 & 22 Vict. c. 56, ss. 12—14); and grants made before the passing of 20 & 21 Vict. c. 77, have (sect. 87) the same force and effect as if they had been granted under that Act, upon payment of such further duty as would have been chargeable on any probate which, but for that Act, would have had to have been obtained in respect of the property not covered by the grant (see *Re Freckleton*, 1 Sw. & Tr. 16; *Re Elwell*, Ib. 27; *Re Tucker*, 2 Sw. & Tr. 123; *Re Porter's Will*, 6 W. R. 304).

VII.

TABLE OF LEGACY AND SUCCESSION DUTIES.

See 55 Geo. 3, c. 184; 16 & 17 Vict. c. 51.



UPON every succession; or where any legacy, residue or share of residue, of the value of 20*l.* or upwards, shall be given, or shall devolve, to or for the benefit of any person, according to the value thereof:—

Where the successor, legatee or recipient, shall be—

- | | |
|--|---------------|
| 1. The lineal issue, or lineal ancestor of the predecessor, testator or intestate | } 1 per cent. |
| 2. A brother or sister, or a descendant of a brother or sister, of the predecessor, testator or intestate } | 3 per cent. |
| 3. A brother or sister of the father or mother, or a descendant of a brother or sister of the father or mother of the predecessor, testator or intestate. } | 5 per cent. |
| 4. A brother or sister of a grandfather or grandmother, or a descendant of a brother or sister of a grandfather or grandmother of the predecessor, testator or intestate } | 6 per cent. |
| 5. A person in any other degree of collateral consanguinity, or a stranger in blood, to the predecessor, testator or intestate } | 10 per cent. |

The forgiveness of a debt due to the testator is a “legacy” to the debtor within the meaning of the Legacy Duty Acts, and duty is payable thereon (*Attorney-General v. Holbrook*, 3 Y. & J. 114); and where there is a direction in a will to pay the debts of another person, the creditors must pay duty (*Foster v. Ley*, 2 Sc. 438, 2 Bing. N. C. 269; *Turner v. Martin*, 7 D. M. & G. 429).

LEGACY
DUTY.
55 Geo. 3,
c. 184.
Forgiveness
of debt.

There is no express imposition of legacy duty on charitable legacies (they are expressly exempt in Ireland), and, until recently, there was no case which decided the general question of the liability of such legacies to the duty; it was, however, as a matter of course, claimed and paid at the rate of ten per cent. as on a legacy to a stranger in blood. But in *Re Parker* (4 H. & N. 666, 7 W. R. 600),

Charitable
legacies.

LEGACY
DUTY.Charitable
legacies.

the general question was raised and decided in favour of the liability; if any doubt could still be felt on this subject, see the 16th section of the Succession Duty Act (*post*, p. 575). In some cases, however, where the general liability to duty of charity legacies has been admitted, it has been attempted to escape from the impost on the ground that the legacy was held upon trusts for division amongst large classes, so that no single person could possibly receive so much as 20*l.*; thus, in *Re Wilkinson* (1 C. M. & R. 142; in Exch. Ch. nom. *Attorney-General v. Nash*, 1 M. & W. 237), where the trust was for executors to divide the interest of testator's residue "among poor pious persons in 10*l.* or 15*l.* as they see fit," it was held that the whole residue was not chargeable with duty, but that if any one person were selected more than once, and thus received more than 20*l.*, the duty would be payable on what was so received. But in *Re Francklin's Charity* (3 Sim. 147, 3 Y. & J. 544), a legacy of 50*l.* a year, to be laid out in bread for the poor of a parish, was held liable, although the poor were so numerous that no one received more than the value of two shillings per annum; and in *The Attorney-General v. Fitzgerald* (13 Sim. 83), and *Re Griffiths* (14 M. & W. 510), the duty was held to be payable on sums bequeathed in gross for charitable purposes, which did not require any direct payment to individuals. And in *Re Pearce* (24 Be. 491), and *Harris v. Earl Howe* (29 Be. 261), the Master of the Rolls declined to follow *Re Wilkinson*, believing that that case had been afterwards disapproved of by the Court which decided it. See also *Re Parker* (*ubi supra*).

Rent-charge,
or money
charged on
real estate.

Legacy duty is payable on a rent-charge or annuity charged on real estate (*Attorney-General v. Jackson*, 2 Cr. & J. 101; *Stow v. Davenport*, 5 B. & Ad. 359); but an annual allowance out of rents and profits for maintenance and education of an infant devisee is not chargeable with duty (*Shirley v. Earl Ferrers*, 1 Ph. 167). In that case Lord *Lyndhurst* said:—"The estate out of which the allowance is to come is her estate; nothing but what is a charge upon the estate of another person will come within the statute;" but the duty, nevertheless, is payable by a devisee in respect of money belonging to the testator, charged on his own real estate, the incumbrance having been kept on foot by the testator (*Swabey v. Swabey*, 15 Sim. 502).

Appointment
in exercise of
power.

As to the duty being payable on personal property appointed by will in exercise of a power, see *Re Cholmondeley* (1 Cr. & M. 149); as to benefits derived from the exercise of a power of appointment over money, the produce of real estate, it is to be borne in mind that the interests called into existence by the exercise of the power take effect in the same manner as if created by the instrument conferring the power; consequently, if the power was created by will, legacy

duty is payable. If the power be both created and exercised by will, the money given is a legacy under the latter will in fact, but under the earlier will in operation of law; it derives its legal character out of, and the charge is made by, the original, not the engrafted will (*Attorney-General v. Pickard*, 3 M. & W. 552, 6 M. & W. 348). Where the power is created by deed and exercised by will, legacy duty is likewise payable (8 & 9 Vict. c. 76, s. 4; *Attorney-General v. Marquis of Hertford*, 3 Exch. 670); so also, if created by will, and executed by deed (*Attorney-General v. Pickard*, *supra*; *Sweeting v. Sweeting*, 1 Drew. 331).

LEGACY
DUTY.

In the case of a special power, the rate of duty will depend upon the relationship of the appointee to the donor (not the donee) of the power, the charge on the real estate being created by the instrument which created the power, in the same manner as if the person to whom it is in the event given by the exercise of the power had been mentioned by name in the instrument creating the power as the object of the donor's bounty (*Attorney-General v. Pickard*, *supra*); and the rate of duty will be the same in the case of a general power created by will and exercised by deed. But in the case of a general power exercised by will, the rate will depend upon the relationship of the appointee to the appointor, the donee of the power: for the appointor, by exercising his general power, makes the fund liable for his debts—in fact, makes the fund his own, and part of his estate—and the appointee therefore takes the appointed fund, or such part of it as may come to him, under and by virtue of the will of the appointor, and not under the instrument creating the power. Thus, where A. by will left real and personal estate to trustees upon trust to convert, invest and pay the income to B. for life, and after her death upon such trusts as she should by will appoint, and in default, in trust for C. and D.; B. by her will gave (subject to her debts, funeral and testamentary expenses and certain legacies and annuities) all the residue of her property (thereby exercising her general power of appointment, sect. 27, *ante*, pp. 48—50,) unto and equally between C. and D.; it was held, that legacy duty was payable at the rate depending on the relationship of C. and D. to B. (*Attorney-General v. Brackenbury*, 1 H. & C. 782); and further, that C. and D. must claim, if at all, under the appointment by B., and could not elect to take under the gift in default of appointment contained in the will of A. (*ib.*). Compare the 4th section of the Succession Duty Act, *post*, p. 572.

Rate of duty :
special power,
or general
power exer-
cised *inter*
vivos.

—general
power, ex-
ercised by
will.

Where a rent-charge or annuity is appointed upon condition of relinquishing some other benefit, as *e.g.* to a wife on relinquishment of her dower, the duty is nevertheless payable on the whole charge

Appointment
on condition
of giving up
other bene-
fits.

LEGACY
DUTY.

or annuity, and no allowance is made in respect of the value of the relinquished benefits (*Attorney-General v. Lord Henniker*, 7 Exch. 331, 8 Exch. 257), and it seems to be immaterial whether the condition is imposed by the instrument creating or by the instrument exercising the power (*Sweeting v. Sweeting*, 1 Drew. 331).

Personalty to
be applied in
purchase of
realty.

As to personal estate directed to be applied in the purchase of real estate, see 36 Geo. 3, c. 52, s. 19; *Attorney-General v. Twyford*, 9 Ha. 730, n., the decision of the Exchequer in which case seems (notwithstanding *East v. Twyford*, 4 H. L. C. 517) to be good to show that if the will had, instead of a life estate, conferred an estate tail or estate of inheritance in possession in the land, the devisee would have been chargeable with legacy duty.

Proceeds of
sale of realty.

A direction to sell real estate and invest the proceeds in other real estate creates no liability to legacy duty (*Heal v. Knight*, 8 Exch. 839, n.; *Mules v. Jennings*, 8 Exch. 830). Where real estate was devised to A., but with an option to B. to take it at a stated price, and the option was exercised, it was held that legacy duty was payable on the price (*Attorney-General v. Wyndham*, 1 H. & C. 563, 8 Jur., N. S. 1182). As to the liability of money to arise from the sale of land directed to be sold, see *Re Evans* (2 C. M. & R. 206); *Attorney-General v. Mangles* (5 M. & W. 120); *Attorney-General v. Simcox* (1 Exch. 749); *Williamson v. Advocate-General* (10 C. & F. 1); *Attorney-General v. Metcalfe* (6 Exch. 26); *Hobson v. Neale* (8 Exch. 368, 17 Be. 178); *Advocate-General v. Smith* (1 Macq. 760); *Harding v. Harding* (2 Gif. 597). Where the direction for sale is absolute and imperative, the duty is of course payable; and this is so, even though the land is not in fact sold (*Attorney-General v. Holford*, 1 Pri. 426; *Williamson v. Advocate-General*, *sup.*); but the decisions are somewhat conflicting as to the liability to duty when the devisees of the estate have a discretion whether or not to sell. This and other questions already touched upon in this note are now of comparatively small importance, since the Succession Duty Act has imposed upon real estate a tax equal in amount to the legacy duty upon personal estate.

SUCCESSION
DUTY.

16 & 17 Vict.
c. 51.

"The Succession Duty Act, 1853" (16 & 17 Vict. c. 51), took effect as from the 19th May, 1853; it applies to the whole of the United Kingdom, to property both real and personal, whether derived under settlement or by will, by descent, intestacy or survivorship. Owing to the wide purview of the statute, and the consequent generality of the language employed, its interpretation is far from easy, and the Courts have frequently been divided in opinion as to its proper construction in the cases which have been already litigated: the Act, however, is to be construed, not according to the techni-

calities of law, but according to the ordinary popular use and meaning of the language employed (*Lord Saltoun v. Advocate-General*, 3 Macq. 659, 8 W. R. 565; *Lord Braybrooke v. Attorney-General*, 9 H. L. C. 150, 9 W. R. 601), and for the purpose of ascertaining whether any and what duty is payable, regard must be had to the substance of the transaction, and not merely to the machinery by which it is carried into effect.

SUCCESSION
DUTY.

By the 1st section, leaseholds are included for the purposes of the Act in the term "real property," and succession duty is payable thereon accordingly, but they are no longer liable to legacy duty (sect. 19).

Leaseholds
pay succes-
sion, not
legacy duty.

The second is the governing section of the Act; it enacts that "every past or future disposition of property by reason whereof any person has or shall become beneficially entitled to any property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person, in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a 'succession;' and the term 'successor' shall denote the person so entitled; and the term 'predecessor' shall denote the settlor, disponent, testator, obligor, ancestor or other person from whom the interest of the successor is or shall be derived."

Definition of
"succession,"
"successor,"
"predecessor."

The duty attaches on real estate which vested in remainder before, but does not fall into possession until after, the commencement of the Act (*Wilcox v. Smith*, 4 Drew. 40; *Attorney-General v. Fitzjohn*, 2 H. & N. 465, 5 W. R. 876; *Attorney-General v. Lord Middleton*, 3 H. & N. 125, 6 W. R. 300). The section applies not merely to cases where the title accrues at death, but also to cases where the title accrued before the Act, but is made an interest in possession "after any interval," on a death occurring after the Act (*Attorney-General v. Gell*, 3 H. & C. 615). See also, on the construction of the 2nd section, *Attorney-General v. Yelverton* (7 H. & N. 306, 7 Jur., N. S. 1250); *Attorney-General v. Gardner* (1 H. & C. 639, 11 W. R. 378); *Re Jenkinson* (24 Be. 64).

The duty is not payable on legacies given by the will of a testator who is domiciled in a foreign country (*Wallace v. Attorney-General*, L. R., 1 Ch. App. 1). But as to testamentary appointments in exercise of powers conferred by English instruments, see below.

Domicile of
testator.

By the 3rd section, joint tenants taking by survivorship are to be

SUCCESSION
DUTY.
Powers of
appointment
—general,
and limited.
General
power.
*Re Lovelace's
Settlement.*

deemed successors ; and by the 4th section, a person having a general power of appointment over property shall, in the event of his making any appointment thereunder, be deemed to be entitled, at the time of exercising such power, to the property or interest thereby appointed as a succession derived from the donor of the power ; and where a person has a limited power, any person taking any property by the exercise of such power shall be deemed to take the same as a succession derived from the donor of the power. The first branch of the section, as to a general power, was brought under the notice of the Courts in *Re Lovelace's Settlement* (4 De G. & J. 340; reversing 5 Jur., N. S. 428); Mrs. Lovelace, under her marriage settlement, dated in 1817, was tenant for life of certain personalty in remainder after the death of her husband (who died in March, 1852), with a general power of appointment by deed or will; after her marriage she became, and continued to her death to be, domiciled in France; in April, 1852, she made a will, exercising her power of appointment, and died in 1856. V.-C. Wood held, that succession duty was not payable by the appointees, on the ground that appointees under powers were not affected by sect. 2, that successions under powers were dealt with by sect. 4 alone, and that sect. 4 applied only to wills or settlements taking effect after the commencement of the Act. This decision was reversed on appeal, and it was held (1), that sect. 4 did not wholly exclude from the operation of sect. 2 the case of a person taking under a general power, but that sect. 2 was displaced *pro tanto* only and applied to a case where sect. 4 was inapplicable; (2) that the words of sect. 4, "taking effect upon the death of any person dying after the time appointed for the commencement of this Act," were referable to the power of appointment, and not to the disposition of property (punctuating and reading the section thus:—"Where any person shall have a general power of appointment, under any disposition of property, [such power] taking effect upon the death," &c.); consequently, that sect. 4 was not restricted to cases where the power was created after the commencement of the Act; (3) that the power came into operation on the death of Mr. Lovelace, and, therefore, the case was not within sect. 4; but (4) that the appointees were chargeable with duty under sect. 2, the appointed personalty (not being within the operation of sect. 4, and, therefore,) not being treated as the property of the donee of the power, so as to be entitled to claim exemption on the ground of the foreign domicile of the donee, and the Act being applicable to a succession under a British settlement to property vested in British trustees, and falling under the jurisdiction of a British Court, although the appointees were aliens domiciled abroad.

And where a testator who died in 1856, domiciled in England,

gave a fund to trustees upon trust to pay the income to his daughter for life, and after her death in trust for such persons as she should by will appoint; the daughter died domiciled in Jersey, having appointed the fund by will; it was held that either legacy or succession duty was payable, and in the view of the Lord Justice *Turner*, it was succession duty, and not legacy duty (*Re Wallop's Trust*, 1 D. J. & S. 656). This was a case indisputably within sect. 4; legacy duty as between father and daughter was paid on the whole fund by the executors of the original testator; succession duty was paid by the appointees under the daughter's will, as on a succession from the daughter, the donee of the power.

SUCCESSION
DUTY.
—
General
power of
appointment.

In *Re Barker* (7 H. & N. 109, 7 Jur., N. S. 1061), where A. before the Act devised lands to B. for life, with an absolute power of appointment over the same, and B. by will after the Act appointed the lands to C., it was held that A., and not B., was the predecessor of C. But see L. R., 1 Exch. 230, as to the authority of that case. In *Attorney-General v. Upton* (L. R., 1 Exch. 224) it was held that the appointor, or donee of the power, not the donor of the power, is the predecessor of the appointee. See also *Re Chapman's Trusts* (2 H. & M. 447).

The result seems to be that, in a case within sect. 4, the donee of a general power of appointment, by exercising his power, is (for the purpose of making the duty attach) to be deemed to be the owner of the appointed property, and the duty is accordingly payable as on a succession from the donor of the power to the donee; the donee of the power is then made a new terminus of succession, and his appointees are chargeable with duty as on a succession derived from him. And this is not altered by the fact that the donee of the power is domiciled abroad.

By the 5th sect. the extinction of a charge determinable on death is made to confer a succession. Thus, suppose A. possessed of real estate subject to a jointure rent-charge in favour of B. during her life; on the death of B. succession duty is payable by A. in respect of the increase of benefit which he derives from the extinction of the charge.

Extinction
of charges.

The 10th section imposes the rates of duty payable, which, as in the case of the legacy duty, are made to depend upon the nearness or remoteness of relationship existing between the predecessor and successor. The husband or wife of a predecessor, testator or intestate is exempt from either legacy or succession duty; and generally, by the 11th section of the Act, a husband or wife is entitled, in calculating the amount of either legacy or succession duty, to take advantage of the nearer relationship of the other to the predecessor,

Rate of duty.

SUCCESSION
DUTY.

testator or intestate from whom the benefit is derived ; sect. 11 is in terms prospective only, but by a Treasury Minute the Commissioners have been authorized to consider this relaxation of the old law as applicable to all legacies, without reference to the date of the testator's death (Trevor on Succession, 316). The 12th section relates to the case of a person taking a succession under a disposition made by himself, or in other words, where the successor is also the predecessor ; it would seem that the first part of this section applies only to cases where the disponent would himself have been chargeable with duty (see *Attorney-General v. Gardner*, 1 H. & C. 652).

Rate of duty.

Numerous cases have arisen as to the rate of duty chargeable, the question in such cases being,—granted that there has been a succession, who is the successor's predecessor ? See *Attorney-General v. Sibthorp* (3 H. & N. 424, 6 W. R. 774), *Lord Braybrooke v. Attorney-General* (9 H. L. C. 150, 9 W. R. 601), cases where family estates were disentailed and re-settled by tenant for life in possession and tenant in tail in remainder ; by the latter case it is in effect established that if tenant in tail in remainder joins with tenant for life in executing a general power of appointment to another, the interest of the appointee is derived from the tenant in tail in remainder, and must be charged with duty accordingly ; see also *Attorney-General v. Floyer* (9 H. L. C. 477, 10 W. R. 762) ; *Attorney-General v. Smythe* (9 H. L. C. 497) ; *Lord Saltoun v. Advocate-General* (3 Macq. 659, 8 W. R. 565), a case of a Scotch entail ; *Attorney-General v. Baker* (4 H. & N. 19) ; *Re Jenkinson* (24 Be. 64), a case where a charge was created for value and part thereof was contemporaneously settled upon the daughters of the purchaser. Upon the second marriage of a lady, the husband settled his property on her children by the former marriage ; it was held that he, and not she, was the predecessor (*Re Ramsay's Settlement*, 30 Be. 75).

Transmitted
or transferred
interests.

The 14th section regulates the duty payable on transmitted successions of personalty ; when the interest of a successor passes by death to another successor before it has fallen into possession, one duty only is payable, but at the highest rate which would have been payable under any of the successions (*Re Chapman's Trusts*, 2 H. & M. 447). The 15th section fixes the amount payable in respect of transferred interests in reversionary property. In *Attorney-General v. Gardner* (1 H. & C. 639, 11 W. R. 378), it was held that the deviser (dying before the Act) of a reversion in respect of which he would not have been chargeable with duty, if it had vested in possession in him after the commencement of the Act, created by

the devise a new succession; and consequently that when the reversion fell into possession (after the Act) the devisee took a new succession from the devisor as his predecessor, and not a derivative title within sect. 15; the Court intimating a strong opinion that the first part of sect. 15 applied only to cases where the disposer or alienor would himself be liable to duty (see 1 H. & C. 652; see also *Attorney-General v. Yelverton*, 7 H. & N. 329). In *Attorney-General v. Rushton* (2 H. & C. 812), a testator devised to his wife for life, remainder in fee to R. a stranger in blood; R. died intestate, before the Act; testator's wife died after the Act, and the heir-at-law of R. thereupon became entitled in possession; duty was held payable at 10 per cent.

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DUTY.
—

The 16th section renders the duty payable at the rate of 10 per cent. upon property becoming subject to a trust for any charitable or public purpose. See *Re Parker* (4 H. & N. 666, 7 W. R. 600; and see *ante*, p. 568).

Charitable or
public pur-
pose.

The 17th section enacts that "no policy of insurance on the life of any person shall create the relation of predecessor and successor between the insurers and the insured, or between the insurers and any assignee of the insured, and no bond or contract made by any person *bonâ fide* for valuable consideration in money or money's worth for the payment of money or money's worth after the death of any other person, shall create the relation of predecessor and successor between the person making such bond or contract and the person to or with whom the same shall be made." The interest accruing by survivorship to the members of a tontine are by this section rendered not liable to the duty (*Oldfield v. Preston*, 3 D. F. & J. 398). By an arrangement between tenant for life in possession and tenant in tail in remainder, the former secured an immediate annuity to the latter, and the latter secured a gross sum payable at the death of the former and as he should appoint; on the death of the tenant for life, it was held that this sum was a debt for valuable consideration, and as such was within the exemption of the 17th section (*Re Jenkinson*, 24 Be. 64). In *Floyer v. Bankes* (2 N. R. 217) freehold estates were conveyed to such uses as H. B. and W. B. should jointly appoint, and in default to the use of H. B. for life, remainder to W. B. for life, remainder to his first and other sons successively in tail male, remainder to G. B. for life, remainder to his first and other sons successively in tail male, with remainders over; in consideration of marriage between G. B. and G. N., the estates were by H. B. and W. B. appointed to the use that G. N. should, in case she should survive G. B., receive a yearly rent-charge during her life for her jointure and in lieu of dower, thirds

Exemption in
certain cases.

SUCCESSION
DUTY.Exemption in
certain cases.

and freebench; powers of entry and distress were given, and a term of years was vested in trustees for securing payment of the jointure; and subject thereto the estates were appointed to uses: it was held by the M. R. that this case was covered by the words of the 17th section, and consequently that succession duty was not payable in respect of the rent-charge; but this was reversed on appeal (3 D. J. & S. 306, the marginal note is incorrect); the marriage not being "consideration in money or money's worth," and a contract in consideration of marriage not being excepted from the duty, even in favour of persons coming directly within that consideration.

The 18th section exempts from duty any succession or successions derived on any death from the same predecessor which do not in the aggregate amount to or to the value of 100*l.*, and also any moneys applied to the payment of succession duty under a trust for that purpose; and no duty is payable in respect of a succession by any person who would be exempt from legacy duty, if the same were a legacy bequeathed to him by the predecessor; no person is to be charged with duty in respect of any interest surrendered or extinguished before the 19th May, 1853; and no person charged with legacy duty shall be charged also with succession duty in respect of the same acquisition of the same property (see *Re Chapman's Trusts*, 2 H. & M. 447). It appears, however, from *Attorney-General v. Fitzjohn* (2 H. & N. 465), that exemption from legacy duty does not necessarily draw with it an exemption from succession duty: in that case, a testator, who died in 1803, bequeathed stock upon trusts for his children and grandchildren successively; at that time no duty was payable on legacies to direct descendants; the testator's daughter died after the Succession Duty Act came into operation, and it was held that the succession duty attached under sect. 2, the exemption created by sect. 18 being referable, not to the property, but to the persons expressly mentioned as exempt in the Legacy Duty Acts. And in *Re Wallop's Trust* (1 D. J. & S. 656), it was held that legacies, which by reason of foreign domicile were exempt from legacy duty, were liable to succession duty.

Valuation
and mode of
payment of
duty in re-
spect of
realty.

By the 21st section, the interest of a successor in real property is to be valued as an annuity according to tables annexed to the Act; and the duty chargeable is to be paid by eight half-yearly instalments; but instalments not due at the successor's death are remitted, "except in the case of a successor who shall have been competent to dispose by will of a continuing interest in such property." The competency here referred to is (of course) competency in respect of estate or by means of a power, and not mental competency (*Attorney-General v. Hallett*, 2 H. & N. 368). Where tenant in tail,

immediately after the death of tenant for life, executed a disentailing deed, and died before any instalment of duty became due, and his son and devisee, who but for the deed would have been the next tenant in tail, succeeded to the property, he was held liable to pay the duty which his father would, if living, have paid (*Lord Lilford v. Attorney-General*, L. R., 2 H. L. 63), in addition to the duty payable in respect of his own succession from his father; the disentailing deed did not destroy the interest of which the father was the successor, but enabled him to render it perpetual; he was competent to dispose by will of a "continuing interest," and the duty was a continuing charge on that interest. It would seem also that in the valuation for the purposes of the Act the actual annual value at the time of the succession, and not the prospective value, is to be considered; thus waste land near a large and increasing town, of large prospective selling value, but not actually saleable or producing income, was held not to be subject to the duty (*Attorney-General v. Lord Sefton*, 2 H. & C. 362, affirmed 5 N. R. 436); *qu.* whether, if not producing income, but nevertheless having a saleable value, the duty was payable on the amount which it would have fetched if sold at the time of the succession.

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DUTY.

By the 22nd section, an allowance is to be made of all necessary outgoings in estimating the annual value of property yielding income not of a fluctuating character. This allowance will not include income-tax or agency expenses (*Re Elwes*, 3 H. & N. 719); and if the legal estate be devised to trustees, the *cestuis que trust* is not entitled to deduct as "necessary outgoings" the trustees' expenses of management (*Re Earl Cowley's Succession*, L. R., 1 Exch. 288).

Allowance
for necessary
outgoings.

The 23rd section fixes the rule as to timber; the 24th as to advowsons; the 25th as to property subject to beneficial leases; the 26th as to manors, mines, or other real property of a fluctuating yearly income; the 27th as to the duty payable by a corporation, company or society taking real estate as successors; and the 28th makes an allowance for fines, &c. payable by the successor in respect of copyhold or other real property.

Timber;
advowsons;
beneficial
leases;
mines, &c.
of fluctuating
income; cor-
poration.

Allowance
for fines of
copyholds.

By the 29th section, moneys to arise from the sale of real property under any trust for sale, so far as the same shall not be chargeable with legacy duty (see *ante*, p. 570), are to be deemed personal property chargeable under the Act; but where such moneys are subject to a trust for re-investment in realty to which the successor would not be absolutely entitled, such moneys are to be deemed real property, and each successor's interest therein shall be considered as of the value of an annuity, payable during the period for which he is

Money to
arise from
sale of realty.

SUCCESSION
DUTY.

Personalty
subject to
trust to pur-
chase realty.

entitled, equal in amount to the annual produce of the actual trust property at the time of his becoming entitled in possession.

By the 30th section, the interest of a successor in personalty subject to a trust for investment in the purchase of realty to which the successor would be absolutely entitled is, so far as the same is not chargeable with legacy duty, chargeable with succession duty as personalty; and personalty subject to a trust for investment in realty to which the successor would not be absolutely entitled is, so far as aforesaid, chargeable with succession duty as realty, and each successor's interest therein shall be considered as of the value of an annuity, payable during the period for which he is entitled, equal in amount to the annual produce of the actual trust property at the time of his becoming entitled in possession.

Valuation of
annuities.

By the 31st section, annuities for the purposes of the Act, or of the Legacy Duty Acts, are to be valued according to tables annexed to the Act, and not according to the tables annexed to the 36 Geo. 3, c. 52. The new tables, however, are applicable only to annuities given after the Succession Duty Act came into operation, and not to annuities bequeathed by a testator who died before the 19th May, 1853 (*Re Earl Cornwallis*, 11 Exch. 580, 4 W. R. 711).

By the 33rd section, where the donee of a general power of appointment becomes chargeable with duty in respect of the property appointed by him, he is allowed to deduct from the duty so payable any duty he may have already paid in respect of any limited interest taken by him in such property.

Allowance
for incum-
brances.

No allowance
for contin-
gency.

Duty payable
on property
from time to
time ob-
tained.

The 34th section regulates the allowance to be made for incumbrances, as to which see *Re Peyton* (7 H. & N. 265, 9 W. R. 838); but no allowance is made in respect of contingent incumbrances (sect. 35), unless they take effect; and (sect. 36) no allowance is made in respect of any contingency upon the happening of which the property may pass to another person, but in the event of the same so passing, a return of duty will be made. And (sect. 37) where a successor has not obtained the whole of his succession at the time of the duty becoming payable, he is chargeable only with duty on the value of the property or benefit from time to time obtained by him. Thus, suppose that on the death of A., his heir becomes entitled to real estate out of which the widow of A. is dowable; the heir will be chargeable with duty only on the value of the estate, less the dower; but when the widow's dower ceases by her death, further duty will be payable by the heir in respect thereof. (See *Harding v. Harding*, 2 Gif. 597; and see that case explained in 7 Jur., N. S., pt. 2, p. 425.) Compare also sect. 5, *ante*, p. 573.

Allowance
for property
relinquished.

By the 38th section "where any successor upon taking a succession shall be bound to relinquish or be deprived of any other property,

SUCCESSION
DUTY.

the Commissioners shall, upon the computation of the assessable value of his succession, make such allowance to him as may be just in respect of the value of such property." A person who was entitled to an annuity during the joint lives of himself and wife, determinable on his succeeding to the family estates, was held entitled, upon that event happening, to an allowance for the loss of the annuity (*Re Micklethwait*, 11 Exch. 452, 25 L. J., Ex. 19). And where A. was tenant for life in possession, remainder to B. for life, with remainders over, and an annuity to B. during the life of A. was charged upon all the settled estates, it was held that, the annuity ceasing on the death of A. when B. entered into possession of the estates, B. was entitled to an allowance on account of the annuity (*Lord Braybrooke v. Attorney-General*, 9 H. L. C. 150, 9 W. R. 601; varying on this point the judgment of the Court below, 5 H. & N. 488). See also *Attorney-General v. Sibthorp* (3 H. & N. 424, 6 W. R. 774); *Attorney-General v. Floyer* (9 H. L. C. 477, 10 W. R. 762).

By sect. 40 the Commissioners are empowered to receive the duty in advance, and allow discount; and by sect. 41, to commute the duty presumptively payable in respect of a succession in expectancy for a certain sum to be presently paid. (See *Bailey v. Tindall*, 18 Jur. 668).

Duty paid in advance, or commuted.

By the 42nd section the duty is made a first charge on the interest of the successor; and by the 44th section, besides the successor, every trustee, guardian, committee, tutor, curator, or husband in whom respectively any property or the management of any property subject to the duty shall be vested, and every person in whom the same shall be vested by alienation or other derivative title at the time of the succession becoming an interest in possession, is made personally accountable for the duty. (See 2 Dav. Conv. 1002, for a precedent of a mortgage by trustees of an infant's estate for the purpose of raising succession duty.)

Duty a first charge on the property; —successor, trustees, &c. personally liable.

A certificate from the Inland Revenue Office, that the duty has been paid, discharges the land, and a purchaser is not entitled to further evidence (*Earl Howe v. Earl of Lichfield*, L. R., 2 Ch. 155). And by the 52nd section "every receipt and certificate purporting to be in discharge of the whole duty payable for the time being in respect of any succession or any part thereof shall exonerate a *bonâ fide* purchaser for valuable consideration and without notice from such duty, notwithstanding any suppression or mis-statement in the account upon the footing whereof the same may have been assessed, or any insufficiency of such assessment; and no *bonâ fide* purchaser of property for valuable consideration under a title not appearing to confer a succession shall be subject to any duty with which such pro-

Protection to *bonâ fide* purchaser.

SUCCESSION
DUTY.

Purchaser of
reversion.

perty may be chargeable under the provisions of this Act, by reason of any extrinsic circumstances of which he shall not have had notice at the time of such purchase." On the question of how the duty is to be borne as between vendor and purchaser, see *Dart, V. & P.* 382, 383; where the contract is silent on the subject, the purchaser of a reversion is liable to pay the succession duty thereon when the estate falls into possession (*Cooper v. Trewby*, 28 Be. 194).

Succession duty is payable on money due to the appointee of a policy of insurance effected by an officer of customs under the 56 Geo. 3, c. lxxiii (*Attorney-General v. Abdy*, 1 H. & C. 266; 8 Jur. N. S. 798).

The costs of preparing and rendering accounts to the Inland Revenue Office, for the purpose of paying the duty in respect of the succession of the first equitable tenant for life, are payable out of income (*Earl Cowley v. Wellesley*, L. R., 1 Eq. 656).

28 & 29 Vict.
c. 104.

As to summary proceedings for account and payment of legacy or succession duty, see 28 & 29 Vict. c. 104, Part V.

And, generally, see Hanson's Treatise on the Succession Duty Act.

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